No. 12873.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

Pursuant to the provisions of Section 7 of the Service Extension Act of 1941 (55 Stat. 628, 50 U. S. C. App. Sec. 357), and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U. S. C. App. Sec. 308), as amended, appellee filed this action against appellant in the United States District Court for the Southern District of California, Central Division, on September 22, 1949, and the jurisdiction of that Court was based on the provisions contained in subdivision (e) of said Section 308 [R. 3; Find. I, R. 12]. After answer [R. 6] by appellant the cause was regularly tried before the Court, sitting without a jury, on December 19 and 20, 1950 [R. 11]; the District Court promulgated its findings of fact and conclusions of law on January

31, 1951 [R. 11], and its judgment for appellee on February 1, 1951 [R. 20].

Appellant, being aggrieved thereby, filed its notice of appeal in the District Court on February 5, 1951 [R. 22]. This Court has jurisdiction to review such decision pursuant to Section 1291 of the Judicial Code (62 Stat. 929, 28 U. S. C. Sec. 1291), and the venue is properly laid in the Ninth Circuit (62 Stat. 930, 28 U. S. C. Sec. 1294, Subdiv. 1).

Statement of the Case.

The controversy relates to the appellee's rights, as a veteran, to reinstatement in his asserted pre-war employment and to damages under the Selective Training and Service Act of 1940 and the Service Extension Act of 1941. The District Court's judgment [R. 20-21] ordered appellant to reinstate appellee for the period of one year and awarded appellee damages in the aggregate sum of $102,185.25.

The basic questions are:

(1) Whether appellee's claims for reinstatement and damages are barred by a statute of limitations;

(2) Whether appellee's said claims are barred by laches and delay on his part;

(3) Whether appellee's pre-war status with the appellant was that of an independent contractor;

(4) Whether appellant's circumstances had so changed by the time appellee made application for reinstatement as to make it unreasonable to require appellant to restore appellee to his pre-war status; and

(5) Whether appellant fully satisfied any obligation it may have had to appellee by offering him "a position of like seniority, status and pay."

An affirmative answer to any of these five questions would result, as a matter of law, in a decision in favor of appellant with reversal of the District Court's judgment, *in toto,* as a necessary consequence. On the other hand, only a negative answer to all five of the foregoing issues will bring this Honorable Court to a consideration of the remaining basic issue. That question is:

(6) Whether the relief awarded appellee is excessive.

There is no substantial dispute as to the basic facts. They are all set forth in the Pre-Trial Stipulation dated September 18, 1950 [received in evidence as Plaintiff's Exhibit 50 and comprising a part of the record on this appeal], and in the Supplemental Stipulation of Facts dated January 22, 1951 [comprising a part of the record on this appeal as Plaintiff's Exhibit 51]. For the convenience of the Court, those two stipulations of facts are printed herewith as Appendices A and B, respectively, to this brief.

The following statement of the case is limited to those facts which are contained in the Pre-Trial Stipulation of Facts (App. A) and which the District Court found to be true [Find. XVII, R. 17], or which otherwise appear without controversy. Additional references are inserted to show where the record and exhibits cover and confirm matters contained in the stipulation.

Defendant and appellant, The Plomb Tool Company, is a California corporation engaged in the business of

manufacturing and selling hand tools and related items [Find. II, R. 12].

In November, 1942, and for approximately nine years prior thereto, plaintiff and appellee Lionel H. Sanger was authorized as a manufacturer's representative to sell appellant's merchandise on a commission basis in a specified territory, referred to generally as the "Kansas City territory" and comprising the states of Kansas, Iowa, Minnesota and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the counties of Brown, Beadle, Sanborn and Bonhemme in the State of South Dakota; and the City of Rock Island, Illinois [Find. III, R. 12; Stip. App. A, par. 3].

In November, 1942, appellee terminated his relationship with appellant in order to perform military training and service in the Armed Forces of the United States. On November 15, 1945, he was relieved from training and service and ordered released from active duty with a certificate of satisfactory service, and his terminal leave expired December 29, 1945 [Find. IV, R. 13; Stip. App. A, par. 4].

Immediately prior to appellee's entry upon active naval service, he was engaged in the sale of appellant's products on a commission basis as stated above pursuant to an agreement in writing [Stip. App. A, par. 5] between the appellee and appellant executed by appellee on January 18, 1941 [Ex. 15, printed herewith as Appendix C], as amended by a supplemental territorial agreement dated February 1, 1941 [Ex. 15, printed herewith as Appendix D], by an extension agreement dated December 8, 1941 [Ex. 16, printed herewith as Appendix E], and by sup-

plemental agreements dated respectively April 22, 1942, and September 23, 1942 [Exs. 16 and 19].

During the entire period covered by these written agreements, January 1, 1941, to November, 1942, the operating relationship between the parties was as follows [Stip. App. A, par. 6]:

> Appellee, as a manufacturer's representative, was authorized to and did sell on a commission basis the products and merchandise of other manufacturers in addition to those of appellant, having represented six such others during the period in question [Exs. J-O, Q]. Between January 1, 1941, and November, 1942, appellee received $26,072.16 from appellant as compensation for his sales of appellant's products, and during the same period he received $20,244.49 from the other manufacturers as compensation for the sale of their products [Exs. J-O, Q; Find. XVI, R. 17]. In the conduct of his business appellee chose his own customers and determined his own itineraries in calling upon customers and prospective customers. He was requested by appellant to make reports concerning such itineraries and calls, but he did not follow any regular reporting plan as requested. Appellant from time to time furnished him with names of prospective customers in his territory from whom appellant received inquiries, and appellee reported to appellant regarding the same.
>
> Appellant did not furnish appellee with an office and did not pay or reimburse him for any office expenses. Appellee paid his own expenses in connection with his activities as a manufacturer's representative in selling appellant's products and those of the

six other manufacturers represented by him [Exs. J-O], and in connection therewith he hired and paid with his own funds one assistant who was chosen by him [R. 73-74; Ex. C] and who acted pursuant to his direction [R. 75]. In January, 1941, appellant did pay appellee $30 in partial reimbursement of his expenses in attending an automotive service industry convention. Appellant also made available to appellee a display truck owned by appellant [R. 58, 76], and in December, 1941, appellant paid appellee $200 for repairs and tires for that truck to prepare it for appellee's use [R. 77, Ex. D].

Appellant made no deductions from commissions paid to appellee on account of social security taxes, old age benefits or unemployment insurance [R. 212-213].

Appellee made no investment in a stock of appellant's merchandise. In addition to its stock in Los Angeles, appellant maintained and paid the storage charges on a stock of merchandise in Kansas City from which customers in appellee's territory were supplied insofar as possible.

Appellant had the final authority on the extension of credit to customers and in specific instances from time to time appellant requested appellee to report to it upon his activities in collecting past due accounts.

In January, 1946, within ninety days after he was released from service, appellee made application to appellant for renewal of his pre-war status [R. 122, 177] as a manufacturer's representative, but appellant refused to renew such status [Find. V, R. 13; Stip. App. A, par. 8].

Prior to the time of such request, appellant had revised the geographical limits of its sales territories, and the State of Minnesota and all counties in the State of South Dakota had been eliminated from the "Kansas City territory" [R. 147, 152] in which appellee formerly had been authorized to sell appellant's products. At that time, the sales of appellant's products in such reduced territory were being handled by three full-time salesmen employed by appellant [R. 124, 128, 157], and they handled the sale of no products other than those of the appellant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation. Appellant had theretofore determined [R. 119] that employment of full-time salesmen (as distinguished from manufacturers' representatives handling numerous lines) was necessary [R. 120, 130, 170] by reason of the increase in the volume of appellant's business, in the number of items manufactured by it and in the number of its customers [R. 140, 146, 167-169; Stip. App. A, par. 9].

When appellee applied for renewal of his pre-war status in January, 1946, appellant advised him that in its view he had been an independent contractor and hence had no statutory right to reinstatement [R. 142, 151-152, 217]. Nevertheless, because it respected appellee's ability as a salesman [R. 143, 217], appellant offered him a position as an employee on the same basis as then in effect for its other salesmen, selling exclusively the products of the appellant and its subsidiary corporations [R. 159], either (a) in his former "Kansas City territory," as such territory had been revised to that date [R. 123, 124, 129, 133, 178, 179, 186, 211], or (b) in the "Chicago territory" which then consisted of the State of Illinois and

portions of the States of Indiana, Michigan and Wisconsin [R. 124, 125, 133, 178, 179, 186]. Appellee was informed that if he accepted either of the foregoing proposals it would be necessary to work for appellant exclusively and to cease to represent other manufacturers as he had done prior to the war [R. 123, 124, 139]. Prior to his military service, appellee had handled products of appellant's subsidiary corporations only in cases where such subsidiaries had made tools for appellant on special order [Stip. App. A, par. 10].

At that time appellee advised appellant that he was unwilling to sever his connections with other manufacturers [R. 123, 126, 131, 132, 139] and was unwilling to accept either of the offered positions [R. 151; Stip. App. A, par. 11].

Thereafter in March, 1946, appellee took up with the Selective Service System the matter of his claim for reinstatement [Find. VII, R. 13]. The office of the Director of Selective Service for the State of California conferred and corresponded with appellant during the months of August, September and October, 1946, and appellant reiterated its refusal to renew appellee's pre-war status as a manufacturer's representative [Find. VIII, R. 14]. Appellee was immediately advised of this. The United States Attorney in Chicago, Illinois (to whom the claim had been transferred by the California Selective Service officials), did not file suit against appellant to enforce appellee's claim for reinstatement, and turned the file concerning such claim over to him in February, 1948 [Find. IX, R. 14], more than a year after appellant's last previous word regarding the claim.

During that month of February, 1948, appellee consulted the Chicago law firm of Arvey, Hodes & Mantynband regarding his claim for reinstatement [Find. X, R. 14]. They corresponded with appellant's attorneys, who in November, 1948, sent a letter to appellee's Chicago counsel, again rejecting appellee's claim; and appellee was advised of the contents of the letter on or before December 1, 1948 [Find. XI, R. 14].

Almost eight months later, an action was filed by appellee against appellant in the United States District Court for the Northern District of Illinois on July 22, 1949, to enforce appellee's asserted right to reinstatement, and that action was dismissed without prejudice on September 20, 1949, for want of jurisdiction over appellant in the Northern District of Illinois [Find. XII, R. 15]. This action was filed on September 22, 1949 [Find. XIII, R. 15].

From January, 1946, to September 22, 1949, the date of commencement of this action, appellant paid large and substantial sums of money to salesmen employees as compensation for selling its products in the territory formerly covered by appellee [Stip. App. A, par. 20]. The geographical limits of that "Kansas City territory" have been further revised from time to time since January, 1946, and each of the areas eliminated from time to time from said territory has been made a part of another of appellant's sales territories [Stip. App. A, par. 18]. At the present time three full-time salesmen employed by appellant are handling the sale of appellant's products in such territory. At all times since January, 1946, appellant has employed at least two, and as many as four salesmen to handle the sales of its products in that territory, and such

salesmen have handled no products other than those of appellant and its subsidiaries [Stip. App. A, par. 19].

During the period of approximately four years from his release from the armed forces in December, 1945, to January 23, 1950, appellee rendered services to ten different firms in the sale of their products and received from them $91,549.05 as compensation for his personal services. He paid commissions to other salesmen in the amount of $7,787.60, leaving him $83,761.45 for the four-year period [Stip. App. A, par. 21; Ex. Q].

The District Court held that appellee's action was not barred by any statute of limitations [Concl. IV, R. 18]; that his claims were not barred by laches or delay [Find. XIV, R. 15]; that his pre-war status was not that of an independent contractor [Concl. I, R. 17]; that appellant's circumstances had not, and have not yet, so changed as to make it impossible or unreasonable to require it to restore appellee to his pre-war status [Concl. II, R. 17]; that appellant's offer to appellee did not satisfy its obligation to him within the meaning of the Selective Service Act [Concl. III, R. 18]; that appellee should have been reinstated in January, 1946, in his pre-war status as a manufacturer's representative, free to handle other lines, in his entire pre-war terirtory and at his pre-war commission rates of 12½% and 8% (an average rate of 12.11%, although appellant in 1946 paid none of its sales representatives more than 7½% [R. 201]); and that by reason of appellant's refusal so to reinstate him, appellee was

entitled to damages computed by applying appellee's average pre-war commission rate of 12.11% to all appellant's gross sales during the calendar year 1946 in appellee's former territory as the same was constituted in 1942, less the amount of compensation actually paid by appellant in 1946 to salesmen in such territory other than the man in charge of the territory whom appellant sought to replace, but without offset for appellee's earnings from other sources during the same period [Find. XV, R. 15-16]. This amounted to $79,475.05, plus interest at 7% from January 1, 1947, making an aggregate award of $102,-185.25 [Concl. V, R. 18; Judgment, R. 20-21]. In addition, the District Court ordered appellant to reinstate appellee as a full-time employee for a period of one year as head of sales in the "Kansas City territory" as constituted in 1951 [Concl. VI, R. 18; Judgment, R. 20-21].

Specification of Errors.

1. The District Court erred as a matter of law in deciding that appellee's claims for reinstatement and damages were not barred by the statute of limitations, to wit, Section 338, subdivision 1, of the Code of Civil Procedure of the State of California.

2. The District Court erred in finding that appellee's claims for reinstatement and damages were not barred by laches and delay on his part, that delay in filing suit was contributed to by appellant and that appellant suffered no prejudice. The District Court's findings to that effect are not supported by any substantial evidence and are

contrary to the evidence, and its holding to that effect is contrary to law.

3. The District Court erred as a matter of law in concluding that appellee's pre-war status was not that of an independent contractor and that appellee left a "position in the employ" of appellant within the meaning of the Selective Service and Training Act. The District Court's holding to that effect is not supported by and is contrary to the uncontroverted evidence and the findings of fact, and is contrary to law.

4. The District Court erred in concluding that appellant's circumstances had not so changed by the time of appellee's application for reinstatement as to make it impossible or unreasonable to require appellant to restore appellee to his pre-war status. The conclusion to that effect is contrary to law and is not supported by the findings of fact or by any substantial evidence.

5. The District Court erred in concluding that appellant had not fully satisfied any obligation it may have had to appellee by offering him "a position of like seniority, status and pay" and that his rejection of such offer did not bar his claims to reinstatement and damages. Such conclusion is contrary to law and is not supported by the findings of fact or by any substantial evidence.

6. The relief awarded appellee by the District Court is excessive as a matter of law, even if any was justified, in following particulars:

(a) The District Court erred in finding that appellee's claim for damages was not barred by his

laches for any period prior to the commencement of this action on September 22, 1949, and that appellee was entitled to damages measured by his loss of earnings during the calendar year 1946.

(b) The District Court erred in awarding appellee damages measured by his loss of earnings for the entire calendar year 1946, in addition to ordering appellee reinstated by appellant and enjoining appellant from discharging him without cause for a period of one year following his reinstatement.

(c) The District Court erred in determining that appellee was entitled to damages measured by his asserted loss of earnings for the year 1946 computed on the basis of his pre-war commission rates of 12½% and 8%, when all appellant's sales representatives were paid only 7½% in 1946.

(d) The District Court erred in computing appellee's asserted loss of earnings for the year 1946 on the basis of appellee's former Kansas City territory as the same was constituted in 1942, rather than upon the basis of its reduced area as it existed in 1946.

(e) The District Court erred in refusing to allow appellant an offset for appellee's earnings from personal services rendered to others during the calendar year 1946.

SUMMARY OF ARGUMENT.

A. Appellee's Claims for Reinstatement and Damages Are Barred by the Statute of Limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California.

Neither the Selective Service Act of 1940, nor the Service Extension Act of 1941, which established appellee's alleged rights, if any, prescribes a limitation period within which such rights must be asserted. In these circumstances the appropriate statute of limitations of the state in which the action is brought is applicable, under the Federal Rules of Decision Act, as amended in 1948 (28 U. S. C., Sec. 1652), both to the claim for damages and to the equitable claim for reinstatement.

The appropriate state statute of limitations is Section 338, subdivision 1, of the California Code of Civil Procedure, which provides a three-year limitation period for "an action upon a liability created by statute, other than a penalty or forfeiture." This statute has been specifically held applicable to actions in the federal courts to enforce statutory liability for damages created by federal statutes which prescribe no limitation period. It has also been specifically applied by the Supreme Court of California to claims for reinstatement based upon state statutes.

Since this action was commenced more than three years and seven months after the claim accrued by virtue of appellant's first refusal to reinstate appellee in January, 1946, the action is barred, and the District Court erred as a matter of law in deciding to the contrary.

B. Appellee's Claims Are Barred by Laches and Delay, Which Delay Is Not Attributable to Appellant and Which Resulted in Prejudice to Appellant.

As pointed out above, this action was not commenced until more than three years and seven months after the initial refusal by the appellant to reinstate appellee.

In January, 1946, when appellee first sought reinstatement, appellant advised him of its position that he had no re-employment rights under the Act, on the ground that he had been an independent contractor, and it steadfastly adhered to such position at all times thereafter. In the face of this, the burden was upon appellee to act with dispatch in order to preserve his rights, if any. This he did not do.

Even after the matter was turned back into the hands of appellee from the United States Attorney and the Office of the Director of Selective Service, appellee still delayed more than eighteen months before filing this action, and there was a delay of more than nine months after the last communication between appellee's private counsel in Chicago and appellant's attorneys in Los Angeles.

In the meantime, appellee sought and accepted other sales work, and his gross compensation for personal services to other manufacturers since December, 1945, amounted to more than $116,000.00.

During all this time appellant has been employing other persons to sell its products in the territory covered by appellee prior to the war and has paid out large and substantial sums of money to such salesmen as compensation. Appellee's delay in bringing this action has obviously

operated to the prejudice of the appellant if it is required to pay twice for the services of selling products in the territory in question.

Therefore, this action is barred by appellee's laches and delay, and the District Court erred in finding to the contrary.

C. Appellee's Pre-War Status Was That of an Independent Contractor, and Hence He Is Not Entitled to Reinstatement or Damages Under the Selective Service and Training Act.

It is clearly established that independent contractors do not hold "a position in the employ of" a private employer within the meaning of the Selective Service and Training Act and do not have any reemployment rights whatsoever thereunder. The tests for determining the existence of an independent contractor status are the same under this act as for other purposes. The question must be considered in the light of the basic facts which reveal the fundamental nature of the relationship, and which demonstrate control, exercised or exercisable. Mere labels that the parties attach to a relationship are not such basic facts, do not necessarily depict the fundamental nature of the relationship and cannot overcome the impact of substantive rights.

On the basis of the stipulated facts and the uncontroverted evidence, appellee was an independent contractor. In essence, Mr. Sanger was conducting his own independent calling by representing various manufacturers (including appellant) as he wished, making his own op-

portunities for profit or loss, relying on his own skill and initiative, paying his own expenses, and determining his own hours of work, itineraries and methods of conducting business. He was free of control or supervision by the appellant, except as to the results accomplished.

D. Appellee Is Not Entitled to the Relief Granted, Even Assuming, Without Conceding, That He Left "A Position in the Employ of" Appellant Within the Meaning of the Act and That His Claims Are Not Wholly Barred by Limitations or Laches.

1. Appellant's Circumstances Had so Changed as to Make It Impossible or Unreasonable to Require It to Reinstate Appellee in His Exact Pre-war Position.

The Selective Service Act, Section 308(b), subdivision (B), specifically provides, and the courts have held, that a veteran is not entitled to reinstatement or damages where the employee's circumstances have so changed as to make such reinstatement impossible or unreasonable. The Act does not contemplate or require the freezing of an employer's operations, regardless of economic circumstances affecting the particular business, in order to preserve to the veteran his exact pre-war position. On the contrary, the veteran must take the position as he finds it upon his return from the service and accept the bitter with the sweet so long as he is treated equally with contemporary employees in relation to their relative standings at the time he departed for the service.

In this case, economic factors in the form of substantial growth of the appellant corporation, a great increase in the volume of its sales, adverse reaction of customers against manufacturers' representatives, and advice of a research organization, had all combined to dictate changes in the appellant's sales operation during appellee's military service. Accordingly, full-time salesmen had been substituted for manufacturers' representatives handling numerous lines, a uniform reduction had been made in the commission rate paid to all salesmen, and some changes had been made in the geographical areas of sales territories. In these circumstances it would be unreasonable within the meaning of the Selective Service Act to require appellee's reinstatement to his exact pre-war position, which was no longer available when he returned. Such reinstatement would necessarily disrupt appellant's selling methods and organization, and would give appellee a special, preferred status not enjoyed by salesmen who had remained with the company during the war period. It would, in effect, give him super-seniority. Therefore, appellee was entitled to demand no more than the post-war counterpart of his former position.

2. Appellant Fully Satisfied Any Obligation It May Have Had to Appellee by Offering Him "a Position of Like Seniority, Status and Pay" Within the Meaning of the Act, and Appellee's Rejection of Such Offer Bars His Claims to Reinstatement and Damages.

Section 308(b), subdivision (B), of the Act specifically provides, in the alternative, that an employer shall re-

store a veteran (1) to his position, or (2) to "a position of like seniority, status and pay." This is an unambiguous alternative, and the Act does not require that the employer offer the veteran his exact pre-war job even if it is available (which it was not in this case), so long as an equivalent offer is made.

Here the appellant offered appellee the current counterpart of his exact pre-war job on a basis which was equal in all respects to that enjoyed by other salesmen, who prior to the war had been manufacturers' representatives. That position was at the very minimum a position of "like seniority, status and pay." Appellee's refusal to accept this offer bars his claims for reinstatement and damages.

E. Even if Appellee Is Entitled to Any Relief, That Awarded by the District Court Is Excessive.

1. By Reason of His Delay in Filing Suit, Appellee Is Not Entitled to Recover Damages for Loss of Earnings for Any Period Prior to the Commencement of This Action on September 22, 1949.

Although the veteran has not been guilty of such laches as will entirely bar his rights under the Act, even a short delay in filing suit precludes the award of any damages for the period prior to the commencement of the action. This is true, even though the delay is occasioned by the veteran's seeking the assistance of the Selective Service System or the United States Attorney, or by negotiations with the employer in the face of a definite refusal to rein-

state. To award damages for such an interim period would be unfair and unduly prejudicial to the employer.

In view of the extreme delay in this case, the District Court erred as a matter of law in holding that appellee's laches had not barred his claim for damages at least for the period prior to September 22, 1949, when this action was filed.

2. Appellee Is Not Entitled to Damages Measured by His Loss of Earnings During the Entire Calendar Year 1946, in Addition to Reinstatement for One Year Subsequent to January 1, 1951.

The Selective Service Act of 1940 guarantees a veteran only one year's reemployment. And while the courts have consistently awarded incidental damages as well as one year's reinstatement, we have found no case in which a court has awarded incidental damages for a period five years prior to the period in which reinstatement is ordered as was done here. Such damages are hardly incidental.

3. Damages Measured by Loss of Earnings for 1946 Should Have Been Computed on the Basis of the Commission Rate of 7½% Actually in Effect for All Appellant's Sales Representatives During That Year.

As pointed out above, the Selective Service Act does not freeze the employer's operation and guarantee to the veteran any rights beyond those enjoyed by contemporary employees who had attained at least equal seniority, status and pay with the veteran prior to his entry into the

service. The veteran is entitled to "step back on the escalator" at the point which he would have reached had he not left for service with the armed forces, and this is equally true whether the escalator has traveled up or down in the interim, so long as his relative place is preserved.

Appellant's commission rate for all salesmen had been uniformly reduced, without exception, to 7½% prior to appellee's separation from the service. Yet the District Court held that appellee was entitled to recover his loss of earnings for 1946 computed on the basis of his pre-war commission rates of 12½% and 8%, and the award was so computed. The obvious effect is to give appellee, at appellant's expense, a "super-seniority" far beyond that contemplated by the Act.

4. Damages Measured by Loss of Earnings for 1946 Should Have Been Computed on the Basis of Sales in the Kansas City Territory as It Existed in 1946, Rather Than on the Basis of Its Larger Geographical Area as It Was Constituted in 1942.

Here again the District Court's award places upon appellant an onus of "super-seniority" by measuring damages for loss of earnings in 1946 on the basis of appellee's pre-war Kansas City territory, rather than on the smaller area comprising that territory in 1946.

The reduction in the area of the Kansas City territory took place in the ordinary course of appellant's business, and was in no sense a discriminatory act directed at appellee. The Kansas City territory, as the same was con-

stituted in 1946 when appellee applied for reinstatement, produced a greater percentage of the company's total commission sales than did appellee's pre-war Kansas City territory in the years preceding the war. Thus, computing appellee's damages on the basis of gross sales in the Kansas City territory as constituted in 1946 would have amply afforded appellee the full measure of his rights, if any, and the District Court's award gave him more than the law requires or sanctions.

5. Any Damages Measured by Appellee's Loss of Earnings Should Have Been Made Subject to Offset for Amounts Earned by Appellee From Personal Services Rendered to Others During the Same Period.

The courts have uniformly and consistently required that a veteran's earnings from other employment during a particular period be offset against damages awarded the veteran under the Act. Yet, the District Court in this case refused to allow appellant an offset for appellees substantial earnings from other sources, and in effect provided him with compensation for his own full-time efforts as well as the full-time efforts of another man.

To allow appellee such double compensation is not only contrary to settled law, but is manifestly lacking in elemental principles of justice.

ARGUMENT.

A. Appellees Claims for Reinstatement and Damages Are Barred by the Statute of Limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California.

The stipulated and uncontroverted evidence in this case shows, and the District Court found, (1) that in January, 1946, appellee asserted his alleged rights under the Selective Training and Service Act of 1940 and applied for reinstatement in his exact pre-war position, and (2) that appellant then and there unequivocally refused to reinstate him in accordance with his demand and advised him that it regarded him as having been an independent contractor and therefore as having no rights under the Selective Training and Service Act [Find. VI, R. 13; Stip. App. A, par. 8; R. 142, 151-152, 217]. Appellee did not file this action until September 22, 1949 [Find. XIII, R. 15], more than three years and seven months after that positive refusal by appellant.

In its answer [R. 10] appellant specifically pleaded Section 338, Subdivision 1, of the California Code of Civil Procedure (providing a three year limitation period for an action on a liability created by statute) as a bar to the action.

1. Appellee's Asserted Cause of Action Accrued in January, 1946, When He Demanded and Was Refused Reinstatement.

Clearly, appellant's unequivocal refusal to reinstate appellee and its adherence to its position that he had no rights under the Act, matured appellee's asserted cause of action, if any, not later than January 31, 1946.

In *Walsh v. Chicago Bridge & Iron Co.,* 90 Fed. Supp. 322, the United States District Court for the Northern District of Illinois stated at page 326:

> "There is a controversy as to when the cause of action accrued. It is my opinion that the cause of action accrued on January 15, 1943, *when plaintiff demanded and was refused the reinstatement to which he thought he was entitled under the Selective Training and Service Act of 1940.** As a federal statute is involved, the question of when the cause of action thereunder accrues for purposes of the running of the prescribed limitations period (here the Illinois five-year period) is a matter of federal law. *Cope v. Anderson,* 331 U. S. 461, 464, 67 S. Ct. 1340, 91 L. Ed. 1602; *Rawlings v. Ray,* 312 U. S. 96, 98, 61 S. Ct. 473, 85 L. Ed. 605. The federal rule which has been applied consistently to questions concerning limitations of actions based on federal statutes is that the cause of action accrues from the very first moment that the right to bring court action arises. *Rawlings v. Ray,* 312 U. S. 96, 98, 61 S. Ct. 473, 85 L. Ed. 605."

2. Under the Federal Rules of Decision Act, the Appropriate State Statute of Limitations Is Applicable to an Action in a Federal Court to Enforce a Right to Reinstatement or Damages Created by a Federal Statute Which Does Not Prescribe a Limitation Period.

The federal statute under which appellee asserts his claims does not prescribe a limitation period within which rights must be asserted thereunder. In this situation the appropriate state statute of limitations becomes applicable

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*Emphasis here, as well as elsewhere in this brief, is supplied unless otherwise noted.

under the terms of the Federal Rules of Decision Act, 28 U. S. C., Sec. 1652 (formerly Revised Statutes Sec. 721, 28 U. S. C. 725), which provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Federal Rules of Decision Act has been recently so applied in *Walsh v. Chicago Bridge & Iron Company,* 90 Fed. Supp. 322, *supra,* a case in which the court granted the defendant employer's motion for summary judgment in a veteran's action to recover damages under the reemployment provisions of the Selective Training and Service Act, on the ground that the action was barred by the Illinois Statute of Limitations. The court observed that no federal statute fixed the time within which such an action must be brought and said (p. 326):

> ". . . In these circumstances it is the applicable state statute of limitations which prescribes the time within which the rights must be enforced.
>
> "This rule was established in *Campbell v. City of Haverhill,* 155 U. S. 610, 15 S. Ct. 217, 219, 39 L. Ed. 280. There the plaintiff, suing for infringement of a patent, sought to escape the state limitations statute on the ground that state statutes 'have no application to causes of action created by congressional legislation and enforceable only in the federal courts.' The Supreme Court held, however, that Federal courts were required by the Rules of Decision Act, 28 U. S. C. A. §1652, to follow the applicable state statutes."

The Federal Rules of Decision Act has been held to require the application of state statutes of limitation to causes of action based on federal statutes in many other circumstances.

In *Campbell v. City of Haverhill,* 155 U. S. 610, an action for patent infringement originating in a federal court in Massachusetts was held to be barred by the Massachusetts statute of limitations. The Supreme Court first pointed out that the limitation provision existing in the Patent Act had expired, and then said at page 614:

> "The argument in favor of the applicability of state statutes is based upon Revised Statutes, § 721, providing that 'the laws of the several States, except, etc. . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' That this section embraces the statutes of limitations of the several States has been decided by this court in a large number of cases, which are collated in its opinion in *Bauserman v. Blunt,* 147 U. S. 647. To the same effect are the still later cases of *Metcalf v. Watertown,* 153 U. S. 671, and *Balkam v. Woodstock Iron Co.,* 154 U. S. 177. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction."

In *Abrams v. San Joaquin Cotton Oil Company* (S. D. Cal.), 46 Fed. Supp. 969, the late Judge O'Connor held that the California statute of limitations (Code of Civ. Proc., Sec. 338(1)) was applicable to an action for un-

paid overtime compensation and liquidated damages under the Fair Labor Standards Act, saying at page 975:

> "It is conceded by both the plaintiffs and the defendant, and is also apparent from the Fair Labor Standards Act, that a statute of limitations has not been prescribed setting a time limit in which an action can be maintained under the Act. In this event Section 725, U. S. C. A., Title 28, provides: 'The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Therefore, recourse must be made to the statute of limitations set forth in the California Code of Civil Procedure."

To the same effect is:

> *Lorenzetti v. American Trust Company* (N. D. Cal.), 45 Fed. Supp. 128.

On the same basis, state statutes of limitations have been held applicable to other actions having their origin in federal statutes, such as actions for treble damages under the Sherman and Clayton Acts. *Chattanooga Foundry and Pipe Works v. Atlanta,* 203 U. S. 390; *Williamson v. Columbia Gas and Electric Corporation* (3 Cir.), 110 F. 2d 15, cert. denied, 310 U. S. 639; *Barnes Coal Corporation v. Retail Coal Merchants Association* (E. D. Va.), 43 Fed. Supp. 309.

Even if appellee's claim for reinstatement be regarded as a suit in equity, such claim is barred by the appropriate state statute of limitations under the present provisions of

the Rules of Decision Act. Some cases decided under the old Federal Rules of Decision Act (formerly 28 U. S. C. Sec. 725), prior to its amendment in 1948, held that state statutes of limitation were not applicable to suits in equity in the federal courts because that Act, as it then stood, provided that state laws should be regarded as rules of decision in the federal courts only in actions *"at common law."* Such cases are no longer in point. The old Rules of Decision Act referred to above was repealed by the Act of June 25, 1948, 62 Stat. 992, effective Sept. 1, 1948, and was replaced by the new Federal Rules of Decision Act (28 U. S. C. Sec. 1652) which applies to *"civil actions"* in the courts of the United States rather than merely to actions *"at common law."* Regarding this change, the reviser's notes state:

> " 'Civil action' was substituted for 'trials at common law' to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such act has been held to apply to suits in equity." (Title 28, U. S. Code Cong. Service, 80th Congress, 2nd Session, at page 1868.)

Thus, there is now no distinction between actions at law and suits in equity insofar as applicability of state statutes of limitations is concerned, and the authorities cited herein apply with equal force to appellee's claims both for damages and for reinstatement.

There remains the question as to what is the appropriate state statute of limitations applicable to this action.

3. Section 338, Subdivision 1, of the California Code of Civil Procedure, Prescribing a Three-year Limitation Period for "an Action Upon a Liability Created by Statute, Other Than a Penalty or Forfeiture," Is Applicable to This Case as an Action for Damages and as an Action for Reinstatement.

The federal courts have specifically applied Section 338, Subdivision 1, as providing a limitation period of three years within which a statutory liability created by a federal statute must be enforced.

In *Abrams v. San Joaquin Cotton Oil Co.* (S. D. Cal.), 46 Fed. Supp. 969 and in *Lorenzetti v. American Trust Company* (N. D. Cal.), 45 Fed. Supp. 128, both *supra,* Section 338, Subdivision 1 of the California Code of Civil Procedure was held to be the appropriate statute of limitations applicable to an action to enforce the statutory liability created by the Fair Labor Standards Act.

In addition to the above federal cases which hold that Section 338, Subdivision 1, applies to damage actions based on a federal statutory right, the California courts have held that this statute of limitations applies to an action to compel reinstatement in a position on the basis of a statutory right. In *Harby v. Board of Education,* 2 Cal. App. 418, 83 Pac. 1081, the petitioner sought reinstatement as vice-principal of a school by way of mandamus against the Board of Education. The Political Code of California provides for such reinstatement where there is a discharge without cause. The California court reasoned that the liability was based upon a statute and held that

Section 338, Subdivision 1 of the California Code of Civil Procedure was applicable as a bar to the enforcement of petitioner's right.

In *Jones v. Board of Police Commissioners,* 141 Cal. 96, 74 Pac. 696, the petitioner sought mandamus to compel the California Police Commissioners to admit the petitioner to a position as a policeman. The California Supreme Court held that Section 338, Subdivision 1, of the California Code of Civil Procedure was a bar to the action.

Thus it is conclusively established that the California courts apply Section 338, Subdivision 1, to equitable actions, and more particularly to equitable actions for reinstatement in a position based upon a statutory right.

4. Negotiations for the Adjustment of a Controversy Do Not Toll the Statute of Limitations.

Although negotiations for an amicable settlement were conducted on behalf of appellee on two subsequent occasions by the Selective Service System and his private Chicago counsel, these transactions cannot operate to toll the statute of limitations. Appellant at no time either departed from its flat refusal to reinstate appellee to his exact pre-war position or altered its position that appellee did not have any rights under the Selective Training and Service Act.

The veterans reemployment cases have held that utilizing the services of the Selective Service System and the United States Attorney, as well as direct negotiations with an employer, do not preclude laches from attaching. *Kay*

v. General Cable Corp. (D. N. J.), 59 Fed. Supp. 358, 360, affirmed on rehearing, 63 Fed. Supp. 791; and *Noble v. International Nickel Co., Inc.* (S. D. W. Va.), 77 Fed. Supp. 352, 354. If such negotiations do not prevent laches, then even more clearly a statute of limitations, a definite statute of repose, is not tolled.

Moreover, it is firmly established general law that statutes of limitations are not tolled by negotiations looking toward a settlement of a controversy.

> "The mere pendency of negotiations for the adjustment of a controversy does not suspend the statutory prescription against an action on the claim involved."
>
> 54 C. J. S. 284 (Limitations of Actions, §250).

See, also: *Schwing Lumber & Shingle Co. v. Peterman* 140 La. 71, 72 So. 812; *Taylor v. Harmon,* 120 Okla. 145, 250 Pac. 887.

In summation, Section 338, Subdivision 1, prescribes a limitation period of three years for both an action for reinstatement and an action for damages based upon a statutory right; the Federal Rules of Decision Act requires that it be applied to statutory rights created by the Selective Service Act; and appellee's action, not having been commenced within such three-year period, is barred.

B. Appellee's Claims Are Barred by Laches and Delay.

Without in any way retreating from our position that this action is completely barred by the state statute of limitations even if it be regarded as a suit in equity, we submit that in any event appellee was guilty of laches in delaying more than three years and seven months following appellant's definite refusal to reinstate him, before commencing this action.

During March 1946, after appellant's initial refusal in January, appellee took up with the Selective Service System the matter of his claim for reinstatement [Ex. 33]. He was informed by the office of the Director of Selective Service for California that it had conferred and corresponded with appellant during the months of August, September and October, 1946, regarding his claim, and that appellant still refused to renew his pre-war status [Find. VII and VIII, R. 13-14; Exs. 35, 36, 37]. This additional definite refusal by appellant occurred at least two years and eleven months before this action was commenced on September 22, 1949.

In December 1946, appellee talked to Messrs. Pendleton and Kerr, president and vice-president of appellant, in Atlantic City, who reiterated the company's refusal to reinstate him on any basis other than as a full-time employee [R. 134-135, 179-180]. Fourteen months then passed without further word from appellee.

The United States Attorney in Chicago did not file suit on behalf of appellee to enforce his claim for reinstatement, and, at the request of appellee, turned the file concerning such claim over to appellee during the month of February, 1948 [Find. IX, R. 14]. From this point

appellee delayed one year and seven months before bringing this action.

Appellee then consulted the law firm of Arvey, Hodes & Mantynband in Chicago, and on February 28, 1948, they wrote appellant's attorneys asserting appellee's claim [Find. X, R. 14; Ex. 38]. During November 1948, the law firm of O'Melveny & Myers, as attorneys for appellant, wrote to Messrs. Arvey, Hodes & Mantynband again rejecting the claim on behalf of appellant, and this refusal was made known to appellee on or before December 1, 1948 [Find. XI, R. 14; Ex. 46]. Still, appellee delayed more than nine months before commencing this action.

This is hardly the diligence in protecting one's rights which courts of equity require of those who seek their aid.

1. Veterans' Claims Under the Selective Training and Service Act Have Been Held to Be Barred by Laches and Delay Although the Delay Was Substantially Shorter Than That in This Case.

Appellee's delay in bringing this action not only exceeds the period specified in the applicable state statute of limitations but is greatly in excess of periods of delay which have been held in other cases to bar veterans' rights under the Selective Training and Service Act, purely on the ground of laches.

In *Cummings v. Hubbell* (W. D. Pa.), 76 Fed. Supp. 453, a delay of 23 months after the veteran's discharge from service before commencing the action was held to constitute laches and to bar the veteran's rights under the Selective Training and Service Act. In *Caldwell v. Harman* (S. D. Cal.), 12 C. C. H. Labor cases, Par. 63,671, a veteran's action was held barred by laches after

a delay of eleven months. In *Daniels v. Barfield* (E. D. Pa.), 77 Fed. Supp. 283, an action was held barred by laches where the veteran had been reemployed and then discharged and where he delayed seven months after his discharge before demanding and commencing suit for reinstatement and damages. The court there said at page 285:

> "The very essence of this provision of the Act is that of promptness. Delay not only deprives the Court of the opportunity of rendering prompt aid to those entitled to it but places the defendant at a disadvantage in being lulled into a false sense of security. I am of the opinion that the delay on the part of the plaintiff was unreasonable and amounts to acquiescence in the action of the defendants and accordingly results in a forfeiture of his right to reinstatement and of the incidental right to demand compensation for loss of wages and benefits."

2. Even Before the Amendment of the Rules of Decision Act When the Federal Courts Were Not Bound by State Statutes of Limitations in Purely Equitable Actions to Enforce Federal Rights, Federal Courts Used the State Limitation Period as a Guide in Applying the Doctrine of Laches.

This rule is well stated in *Russell v. Todd,* 309 U. S. 280, where the United States Supreme Court said at page 293:

> "We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. *Cf. Mason v. U. S.,* 260 U. S. 535, 67 L. ed. 396, 43 S. Ct. 200; *Jackson County v. U. S.* No. 14, this

term [308 U. S. 343, *ante,* 313, 60 S. Ct. 285]. In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action."

Here there is no question but that there is a state statute applicable to like causes of action. As pointed out above (under Point A, 3), Section 338, subdivision 1 of the California Code of Civil Procedure has been applied by the California courts to equitable reinstatement proceedings which are indistinguishable in principle from this action for reinstatement under the Selective Service Act. *Jones v. Board of Police Commissioners,* 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education,* 2 Cal. App. 418, 83 Pac. 1081, both *supra.*

3. Appellant Did Not Contribute to Appellee's Delay in Commencing This Action.

The District Court found as a fact that appellant contributed to the delay in filing this action [Find. XIV, R. 15].

The only conceivable evidentiary support for the finding that appellant contributed to the delay lies in the correspondence exchanged between the respective attorneys for the parties during 1948 [Exs. 38-47]. The most that can be said of this correspondence is that appellant, through its counsel, expressed willingness to consider an amicable adjustment of the controversy [Exs. 39, 40], while maintaining its original position that appellee was not entitled to the protection of the Selective Service Act because he had been an independent contractor [Exs. 40, 46]. At no time did appellant or its counsel request appel-

lee to delay filing his action; and the long period that elapsed between February 28, 1948, when appellee's attorneys initiated the correspondence and November 4, 1948, when appellant's final position was stated, could hardly have served to encourage appellee in the belief that the matter was about to be settled. In any event, it in no way prevented him from filing his action, which he did not do until more than ten months after the last letter from appellant's counsel.

Appellee's long delay in filing this action cannot be excused by his long continued and fruitless negotiations with appellant (see *Kay v. General Cable Corp.* (D. N. J.), 63 Fed. Supp. 791, 794), or by his previous referral of his claim to the Selective Service Authorities (*Noble v. International Nickel Co., Inc.* (S. D. W. Va.), 77 Fed. Supp. 352, 355).

The true reason for appellee's delay in filing his action is revealed by the evidence, and it has nothing whatsoever to do with any action or inaction on the part of appellant. Exhibit Q shows that appellee's earnings from his representation of other manufacturers in the post-war period maintained a level during 1946 and 1947 considerably higher than his earnings from all sources, including the sale of appellant's products, during 1941 and 1942. During 1946 and 1947 appellee was doing well enough financially that he had little real interest in securing reinstatement as a sales representative for Plomb Tool Company. Exhibit Q reveals further, however, that in 1948, appellee's earnings from other sources took a substantial drop, and it will be recalled that it was during that year when his Chicago attorneys had the correspondence with appellant's counsel. In 1949, however, appellee's earnings from other sources fell far below their level in the im-

mediate post-war years, and it was then and then only that appellee felt impelled for the first time to seek the assistance of the courts in enforcing his asserted right to reinstatement in which he had theretofore shown only an intermittent interest.

4. Appellant Suffered Prejudice as a Result of the Delay.

The District Court's finding that appellant suffered no prejudice by reason of any delay [Find. XIV, R. 15] is completely unsupported by any evidence and is contrary to the uncontradicted evidence that at all times since January, 1946, appellant has employed not less than two and as many as four salesmen to handle the sale of its products in the territory claimed by appellee [Stip. App. A, par. 19]. From January, 1946, through September, 1949, when this action was commenced, appellant paid such salesmen more than $140,000 in commissions on sales in that territory [Ex. 49]. Beyond any doubt this shows substantial prejudice to appellant by reason of the delay, for the effect of the award of damages to appellee is to require appellant to pay double compensation (and more by reason of the higher commission rate on which appellee's award is based) for the sales of its products made in that territory.

Appellee's gross earnings of more than $116,000 [Ex. Q] from other sources since January, 1946, show the lack of equity in the stale claim now asserted by him. We submit that his action is barred not only by the statute of limitations, but also by his laches and delay to the prejudice of appellant.

C. Appellee's Pre-War Status Was That of an Independent Contractor and Hence He Is Not Entitled to Reinstatement or Damages Under the Selective Service and Training Act.

1. Independent Contractors Are Not Protected by the Selective Training and Service Act.

The term "a position . . . in the employ of an employer" as used in the Selective Training and Service Act does not include within its orbit the status of an independent contractor; and the courts have uniformly held that an independent contractor has no right to reinstatement or damages under the act.

In *Brown v. Luster* (9 Cir.), 165 F. 2d 181, an action for reinstatement under the Selective Training and Service Act, this Honorable Court said at page 184:

> "We agree with the District Court that an independent contractor does not come within the interpretation of the Act. An independent contractor, as the word connotes, is more or less in the same category as a person in business for himself who because of his ability to produce without the control or direction of another is not subjected to the usual and common restrictions and regulations applicable to the ordinary employee . . .
>
> "It is clear, too, that though the legislation in question is to be liberally construed for the benefit of the veteran it aims to apply its provisions to the existing relationship before induction and not to impose upon one person a liability toward another to whom there was no previous liability. Cf. Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 285, 65 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110 . . .

"Whether we are dealing with cases involving the responsibility of a person for the acts of those under his control or with remedial or regulatory statutes, the basic distinctions between an employee and an independent contractor are the same.

"In United States v. Silk, heard together with Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc., 331 U. S. 704, 67 S. Ct. 1463, the Supreme Court laid down certain tests for this distinction. In Henry Broderick, Inc. v. Clark Squire opinion filed October 10, 1947, 9 Cir., 163 F. 2d 980, 982 . . . we . . . said '. . . These tests included degree of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation.'

"We might add to this non-exhaustive list of tests: lack of control or supervision, the independent contractor representing the will of an employer only as to the result to be accomplished, freedom to determine one's own hours of work and to engage in other professional activity, and 'depend [ency] upon [one's] own initiative, judgment and energy for . . . success,' (*Silk* case, *supra* [331 U. S. 704, 67 S. Ct. 1469])—all of which factors were enjoyed by appellant."

2. Appellee Was an Independent Contractor.

As stated in the foregoing quotation from *Brown v. Luster,* the same basic tests are applied in determining whether a veteran is an independent contractor or an employee within the meaning of the Selective Service Act as are applied in distinguishing between an employee and an independent contractor for other purposes. We earnestly submit that, in the light of those tests, the factual elements of appellee's pre-war relationship with appellant, *e. g.,* his simultaneous representation of six other manufacturers,

his payment of his own expenses, his employment of his own assistants, his selection of his own itineraries, and his freedom from appellant's control as to the means and methods of conducting his selling activities, show conclusively that he was an independent contractor.

The most factually comparable case which our research has revealed is the case of *Brown v. Luster,* 165 F. 2d 181, *supra,* decided by this Honorable Court on December 26, 1947. The striking parallel between the facts of that case and those here present prompts setting out the following graphic comparison:

Brown v. Luster	*Instant Case*
1. The veteran sold furniture for the defendant in a specified territory under an oral agreement which was terminable at will by either party.	1. Appellee sold tools for the appellant in a specified territory under a written contract which was terminable upon thirty days' written notice by either party [Ex. 15, App. B].
2. The veteran was paid on a commission basis, the rates being 7½ per cent on lamps and 6 per cent on the sale of occasional furniture.	2. Appellee was paid on a commission basis, the rates being 12½ per cent on tools and 8 per cent on so-called "buy-outs" [Ex. 15, App. C].
3. The veteran was free to solicit orders from whatever customers he selected.	3. Appellee solicited orders from whatever customers he selected [Stip. App. A, par. 6(e)].

Brown v. Luster	*Instant Case*
4. The veteran determined his own hours and places of work, his own schedules, sales routes and itineraries.	4. Appellee determined his own hours and places of work and itineraries and did not follow any regular reporting plan as requested by appellant [Stip. App. A, par. 6(e)].
5. The veteran employed whatever method of salesmanship he desired.	5. Appellee was free to select and use his own methods and means of obtaining his results [Stip. App. A, par. 6(e)].
6. The veteran was not required to spend full time or any particular time in selling defendant's products and was not prohibited from simultaneously selling other articles manufactured by other companies, although he had not done so for several months prior to his induction.	6. Appellee was free to, and did, represent other manufacturers by simultaneously selling their products along with those of appellant, and during the whole two years immediately preceding his entry into the armed services he represented six other such manufacturers and received in excess of 43 per cent of his total gross income for the years 1941 and 1942 from such other manufacturers [Stip. App. A, par. 6(b), (c)].

Brown v. Luster	*Instant Case*
7. The veteran paid all of his own expenses incurred in the making of sales and solicitation of orders, including travel expenses, averaging between $50 and $75 per week.	7. Appellee paid all of his own expenses incurred in the making of sales and solicitation of orders, including expenses which averaged approximately $200 per week for the years 1941 and 1942, with the exception of $30 which appellant paid appellee in partial reimbursement of his expenses in attending an automotive service industry convention and $200 which appellant paid appellee for the initial repairs and tires for a truck which appellant made available to appellee [Stip. App. A, par. 6(d); Exs. J-O].
8.	8. Appellee hired and paid with his own funds one assistant who was chosen by him and who acted pursuant to his directions [Stip. App. A, par. 6(d)].
9. Defendant's office was not the headquarters of the veteran and the veteran was not required to be at defendant's office for any regular or scheduled sales meetings but usually visited the defendant's place of business each weekend.	9. Appellant did not furnish appellee with an office and did not pay or reimburse appellee for any office expenses [Stip. App. A, par. 6(a)].

Brown v. Luster	*Instant Case*
10. There was no sales quota imposed upon the veteran while acting as a salesman for the defendant.	10. There was no sales quota imposed upon the appellee while acting as a salesman for appellant, although the appellant did from time to time in memorandum form publish the relative sales standings of its various manufacturers' representatives [Exs. 2, 3, 4, 14].
11. Defendant did not withhold any Social Security, Unemployment Compensation or other withholding tax from the veteran's commissions.	11. Appellant made no deduction from commissions paid or payable to appellee on account of Social Security taxes, Old Age Benefits or Unemployment Insurance [Stip. App. A, par. 6(f)].
12. The defendant had the final authority in accepting and shipping orders taken by the veteran.	12. Appellant had the final authority on extension of credit to customers and in specific instances from time to time appellant requested appellee to report to it upon his activities in collecting past due accounts [Stip. App. A, par. 6(h)].

In *Brown v. Luster, supra,* this Honorable Court, after reviewing the above evidence, held that the veteran was not within the protection of the Selective Service Act, saying at page 185:

> "There is substantial evidence to support the findings of the Court and we agree that they were sufficient to bottom the conclusion that appellant exercised his own discretion with complete freedom in performing his services; that appellees exercised no direction or control over the manner in which the appellant chose to perform the work; and that appellant was responsible to appellees only as to the results obtained. Tested by these and the requirements of the cases enumerated to distinguish between an 'employee' and an 'independent contractor,' these facts firmly establish the appellant to be an independent contractor and that he did not hold a 'position' in the employ of the appellees."

Other cases in which commission salesmen were held on closely similar facts to be independent contractors, and hence not entitled to reinstatement under the Act, are *Rosenbaum v. Ceco Steel Products Corporation* (D. C. D. C.), 84 Fed. Supp. 954 and *Frank v. Tru-Vue, Inc.* (S. D. Ill.), 65 Fed. Supp. 220. The veterans in both cases, like appellee here, were sales representatives authorized to operate in specified territories, who were paid on a commission basis, who handled the sale of other lines of products in addition to those of the defendants, and who were free to determine their own hours of work and itineraries and to solicit orders in whatever manner and from whatever customers they chose.

The facts in the instant case, as outlined above in connection with those of *Brown v. Luster,* establish with

equal firmness that Mr. Sanger was an independent contractor and did not hold a position in the employ of appellant. Such facts, established without contradiction by the stipulation [Ex. 50; App. A] and the evidence adduced at the trial, are all the basic facts which illuminate the fundamental nature of the relationship between the parties. There is here no question of conflicting evidence resolved by a trial court's finding, for all these basic facts were found by the District Court to be true [Find. XVII, R. 17]. Its conclusion that appellee was not an independent contractor [Concl. I, R. 17] is not supported by the findings or the evidence and is erroneous as a matter of law. This Court has not hesitated to reverse similar decisions where an independent contractor was erroneously held to be an employee (*Henry Broderick, Inc. v. Squire* (9 Cir.), 163 F. 2d 980), and we submit that the same should be done here.

3. "Labels" Which the Parties Have Used and Miscellaneous Incidents of the Relationship Do Not Vary the Impact of the Basic Facts Which Control the Substantive Rights of the Parties.

The basic facts outlined graphically above conclusively demonstrate that appellee's pre-war status was that of an independent contractor. In an effort to vary and camouflage the impact of these basic facts, there were introduced in evidence on behalf of appellee a series of documents and incidental matters which apparently were thought to indicate an employer-employee relationship. A series of documents was introduced in which appellee was referred to as a "salesman" [Exs. 2, 3, 4, 5, 7, 9, 10, 12, 14 and 20]. But the term "salesman" deals only with function and has no bearing upon the nature of the relationship between the salesman and the party whose goods are sold. It connotes

neither an employee nor an independent contractor status. Webster's New International Dictionary, 2d Ed., defines "salesman" as:

> "one whose occupation is to sell, as goods, merchandise, land, securities, transportation, etc., either in a store or within a given territory, specif., a commercial traveler."

Nor is there significance in the fact that, in some of these documents [Exs. 2, 3, 4 and 14], the appellee's sales record was compared with that of other persons, also referred to as "salesmen." The fact is that such other persons at that time (1938-1940) were not employees, but on the contrary as shown by the evidence, were in an identical position with appellee and like appellee were independent contractors [R 161-162, 165-166, 168, 212-213].

Correspondence between the company and appellee contains various offhand references such as "Plomb people" [Ex. 6] and "your company" [Ex. 11],—references which are indicative only of the fact that there was a relationship between him and the company, but not of the nature of that relationship. The evidence reveals other incidental trivia:—in 1939 appellee won a watch in a sales contest [Exs. 9, 10]; he was awarded service pins [Exs. 13, 18] which were given to anyone, including directors of the corporation, having more than two years of connection with the company [R. 176-177, 184]; he made a donation for the employees' club house [Ex. 17]; a letter from appellee after he joined the navy was printed in appellant's company paper, the "Anvil Chorus" [Exs. 26, 27]; and appellant furnished appellee with business cards bearing the company name [Ex. 32]. (The insignificance of the latter item is shown by the fact that similar cards were furnished

to the persons held to be independent contractors in *Rosenbaum v. Ceco Steel Products Co.,* 84 Fed. Supp. 954, and in *Frank v. Tru-Vue, Inc.,* 65 Fed. Supp. 220, both *supra.*)

At the time of appellee's entry into the armed services a letter recommending him for a navy commission was written by Morris Pendleton (who was president of appellant, but who did not sign the letter as such) in which he referred to appellee as having been "district manager" for the company [Ex. 22]. And in a similar letter by Dillon Stevens (also an officer of appellant, but who did not sign in that capacity) it was said that appellee "has been employed by the Plomb Tool Company" [Ex. 24]. Such off-the-cuff references were obviously made informally and at a time when the exact legal nature of the relationship between the parties was not being considered and was of no immediate importance.

It is illuminating to compare such evidence with the acts and statements of the parties when they really considered the legal nature of their relationship at times when it was important.

First of all, the written contract between the parties dated January 18, 1941 [Ex. 15, App. C], which was in effect when appellee went into the navy, contained in Paragraph 11 the following specific provision:

> "11. Nothing herein contained shall be construed to create any relationship of employer and employee between the Company and me or to vest in me any power or authority to engage employees of any kind on behalf of the Company or to obligate the Company

> in any manner, or to vest in the Company any right or power to control the means or manner of accomplishing the results herein contemplated. It is distinctly understood that in order to achieve said results I am to select and use my own methods and means, including the personnel of my assistants and employees, if any, to operate hereunder at my own risk and expense, and to hold the Company free and harmless from any and all liability resulting from my operations hereunder; provided, however, that said work shall be done in such manner as will be consistent with the achievement of the result contracted for, at the time or times herein specified."

In the supplemental agreement dated December 8, 1941, extending that contract for another year, it was referred to as the "contract . . . under which you sell our tools as an independent contractor . . ." [Ex. 16, App. E.]

We recognize, of course, that such contractual provisions would not be controlling if in actual practice appellant had exercised control over the manner or means of appellee's achievement of the contemplated results and if the parties had in fact operated on an employer-employee basis. But the facts show that the parties actually operated in accordance with the quoted clause from the contract. We have already pointed out in the preceding section of this brief the basic facts of the relationship which clearly indicate that appellee operated as an independent contractor. And other acts of the parties lead

to the same conclusion. For example: appellee in his federal income tax returns both before and after the war variously described the nature of his business as "manufacturers' agent" [Exs. J, M, N and O] and as "manufacturers' representative" [Exs. K and L], listing his income received from the several manufacturers represented by him and lumping together all his deductible business expenses. His business stationery had printed at the top "Lionel H. Sanger," his Kansas City address and telephone, and at the bottom was the printed legend "Serving the Automotive and Industrial Jobber" [see Exs. 23, H and R]. Other business stationery used by appellee [exemplified by Ex. E] had the name "L. H. Sanger" printed at the top of the letterhead of Kansas City Warehouse Service Company in which he at one time had a financial interest [R. 78-79] and where he had his desk and received his mail [R. 79-82].

Appellee's own view of his independent status is further illustrated by his vociferous objections when appellant advised him on two occasions of its desire to move the location of its warehouse facilities in Kansas City [Exs. A, B, C, F and H]. The tenor of appellee's replies to such advice and the fact that it was necessary for the president of appellant to bargain with him in order to get him to hire a much needed assistant [Ex. B], go far toward convincing that theirs was not a true employer-employee relationship or anything remotely akin to it.

In 1942, appellant advised appellee that it could not request draft deferment for him because he was an inde-

pendent contractor [Ex. 21]. And appellee apparently specifically recognized that he was an independent contractor and not entitled to reinstatement under the Act when he wrote appellant late in 1942 requesting that he be allowed to hire a man to continue serving his territory during his absence in the armed services in order that he could carry on after the war was over [Ex. 23]. Appellant evidenced a similar view of the relationship when it answered appellee's letter stating that the disposition of the territory would be up to the Plomb Tool Company at the end of the war [Ex. 25].

A consideration of the incidental and for the most part insignificant facts relied upon by appellee, particularly when viewed alongside the other facts outlined above which bear even more strongly the other way, cannot vary or overshadow the basic facts of the relationship, such as appellant's lack of control or supervision, appellee's freedom to determine his hours of work and his methods and means of accomplishing the result, his dependency upon his own initiative, judgment and energy for success, his opportunities for profit or loss, his freedom to take advantage of other professional opportunities by the representation of other manufacturers, and his employment of his own assistants.

Appellee was an independent contractor and the District Court erred as a matter of law in concluding to the contrary.

D. Appellee Is Not Entitled to Any Relief, Even Assuming, Without Conceding, That He Left a Position in the Employ of Appellant Within the Meaning of the Selective Training and Service Act and That His Claims Are Not Wholly Barred by Limitations or Laches.

The Selective Training and Service Act provides two complete defenses to a veteran's claims for reinstatement and damages, even though the veteran is within the general protection of the Act and has acted in a timely fashion.

Section 308(b), Subsection (B) provides:

> "If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;"

Thus there are two alternative and complete defenses to a veteran's action for reinstatement and/or damages, as follows:

(a) Where the employer's circumstances have so changed as to make reinstatement impossible or unreasonable; and

(b) Where a veteran refuses to accept an employer's offer of a position of like seniority, status and pay.

Where the position held by the veteran is no longer in existence when he applies for reinstatement, such change in circumstances is sufficient to make reinstatement unreasonable. *Featherston v. Jersey Central Power & Light Co.* (3 Cir.), 161 F. 2d 1000; *Meyers v. Barenburg*

(4 Cir.), 161 F. 2d 850; *Frank v. Tru-Vue, Inc.*, 65 Fed. Supp. 220, *supra; Rosenbaum v. Ceco Steel Products Co.*, 84 Fed. Supp. 954, *supra.*

Furthermore, where there is a substantially comparable position in the employer's organization, the veteran has no right to insist on more than an offer of such comparable existent position, and a rejection of such an offer bars relief under the Act. In *Bowen v. Home Beneficial Life Insurance Company* (E. D. Va.), 18 C. C. H. Labor cases, Par. 65,720, affirmed (4 Cir.), 183 F. 2d 376, the District Court said at page 77,389:

> "The offer of restoration made by the defendant to the plaintiff upon his application for reemployment constituted an offer by the defendant of a position of like seniority, status and pay equivalent to that of the position which the plaintiff left upon his induction into the Armed Service and the employer's circumstances had so changed during the period of the plaintiff's absence as to make it impossible and unreasonable for defendant to restore the plaintiff to a position identical in every respect to the position formerly held by him. Therefore, the offer made by the defendant constituted full compliance with the requirements of Section 8 of the Act and the plaintiff's refusal to accept such offer constituted a waiver by him of the rights to reemployment otherwise conferred upon him by said Act. The damages sought by the plaintiff against the defendant are, therefore, barred by his refusal to accept the offer of reemployment made by the defendant."

To the same effect are: *Corsi v. Foote Pierson & Co.* (D. N. J.), 12 C. C. H. Labor Cases, Par. 63,543; *Inglot v. Columbia Aircraft Products, Inc.* (3 Cir.), 166

F. 2d 433; *Cohen v. Schaulsky* (D. N. J.), 13 C. C. H. Labor Cases, Par. 64,026; *Bozar v. Central Pennsylvania Quarry etc. Co.* (M. D. Pa.), 73 Fed. Supp. 803; *Trusteed Funds, Inc. v. Dacey* (1 Cir.), 160 F. 2d 413.

1. Appellant's Circumstances Had so Changed as to Make It Impossible or Unreasonable to Require It to Reinstate Appellee in His Exact Pre-war Position.

Appellant's circumstances, as bearing upon appellee's exact pre-war position, had changed in the following respects when he applied for reinstatement in January 1946:

(a) Appellant's sales effort was conducted through full time employee-salesmen rather than through manufacturer's representatives, the method used prior to 1942;

(b) Appellant hired directly all the employee-salesmen in a particular territory and such employee-salesmen were compensated by a percentage of all sales in such territory, whereas there had previously been only one manufacturer's representative in a territory, who had employed his own assistants;

(c) Appellee's pre-war Kansas City territory had been somewhat reduced in geographical area; and

(d) The commission rate had been uniformly reduced from 12½% to 7½% for all the sales force.

In order completely to appreciate the significance of the conversion from manufacturer's representatives to full time employee-salesmen, it is necessary to review both appellant's history and the history of the tool industry generally. Prior to 1942 when the change-over was primarily effectuated, appellant was going through the

period of its early growth. In these circumstances it was appellant's practice to allow, and even to encourage, its manufacturer's representatives to handle the products of other manufacturers, for the reason that appellant's product was not sufficiently established to provide representatives with adequate compensation for their full time and service [R. 30-31, 161-162]. Such a temporary expedient was a customary practice in harmony with the general practice of manufacturers breaking into the tool industry [R. 164].

The general trend of the tool industry, however, was toward conversion to full time employees when the particular manufacturer achieved sufficient volume and good will to warrant requiring and paying for full time services.

A tool line, being highly competitive and detailed, requires concentrated selling for maximum results. Effective marketing is not achieved by merely calling upon customers to replace stock. The company found that customers were resistant to tool sales by multiple line manufacturers' representatives and desired full time employee representation of the manufacturer. Good will and sales volume could be built up only by meeting customer desires and by obtaining full time employees under the company's direct control and supervision as to the manner and method of the sales technique utilized [R. 119-120, 144-145, 166, 168-169].

In 1941, appellant realized that it was coming of age—volume and good will were rapidly expanding [Ex. S]—and began consideration of the feasibility of converting its

sales force to full time employees in order to exploit the full potential of its product. This program was studied by appellant's executives with the assistance of an expert research organization [R. 130, 168-169].

Early in 1942 appellant determined upon the course of converting its sales force to full time employees, and at that time put such policy into effect as to all but three of its salesmen [R. 170-171]. In the case of one exception, Mr. Jones, the policy was not put into effect in 1942 because of difficulties of a geographical and sales volume nature encountered in his particular territory; this exception had been eliminated when appellee sought reinstatement in 1946 [R. 171]. In the case of the second exception, Mr. Schrenker, appellant did not put the policy into effect in 1942 because Schrenker, who represented only two other small tool lines and who employed two other men to handle them, agreed to spend his own full time in the sale of appellant's products, leaving the other lines to his assistants, and thus meeting appellant's primary objection to manufacturer's representatives [R. 136, 171]. In 1946 when appellee requested reinstatement, Schrenker was still spending his full time on appellant's line, but had been informed that it would be essential for him to convert to employee status at the end of the year [R. 136, 140]. Appellee was the third exception, and appellant did not put the new policy into effect in 1942 in his case because it knew that he would shortly leave for service in the armed forces and did not wish to impose upon him the inconvenience entailed in such a change-over [R. 146].

Appellant's policy, thus determined and put into effect, had proven its effectiveness by the results achieved up to the time of appellee's application for reinstatement in 1946. The company's total sales had increased from $2,414,000 in 1941 to $6,852,000 in 1945, and further to $10,600,000 in 1946 [Ex. S]. Concurrently, appellant's percentage of the total tool industry sales rose from 5.4% in 1941 to 9.0% in 1945 and 11.7% in 1946. And while the increase in volume may have been due in part to activity occasioned by the war, appellant's capture of a progressively greater percentage of the total industry sales shows the results of its revised sales policy with its broader and more concentrated coverage of customers.

In view of the change of appellant's circumstances outlined above, and the proven success of its altered sales policies, it would have been unreasonable indeed to require appellant to reinstate appellee in his exact pre-war status as a manufacturers' representative, free to handle other lines, and thus to require the company to retrogress to a policy proven far less effective. Even the District Court recognized this in part by ordering appellee reinstated only as a full-time employee in the Kansas City territory *as constituted in January, 1951* and under the same arrangements as *then* existed for the then acting sales manager of that territory [Concl. VI, R. 18; Judg., R. 20-21].

We submit that reinstatement on the pre-war basis would have been just as unreasonable in 1946 as in 1951, and that the District Court erred in concluding to the contrary.

2. Appellant Fully Satisfied Any Obligation It May Have Had to Appellee by Offering Him "a Position of Like Seniority, Status and Pay," and Appellee's Rejection of Such Offer Bars His Rights Under the Selective Training and Service Act.

Wholly aside from changed circumstances making reinstatement unreasonable, the Act imposes on the employer only an alternative obligation, *i. e.,* to restore the veteran *either* to his pre-war position *or* to "a position of like seniority, status and pay." Even if the exact pre-war position is still available, the employer can satisfy any obligation he has by offering a position of the latter type.

In *Schwetzler v. Midwest Dairy Products Corporation* (7 Cir.), 174 F. 2d 612, the plaintiff had been employed to sell soft drinks on one of seven routes operated by defendant. Upon plaintiff's discharge from the armed services, defendant declined to give him his pre-war route, but offered him another route which carried with it the opportunity for earnings at least as great. The plaintiff refused because the new route involved more mileage and longer hours. The Court of Appeals for the Seventh Circuit held that the offer discharged the employer's obligation, saying at pages 613-614:

> ". . . the Act does not require that the returning veteran be given the same position, but only that he be given that position or a comparable one, and the cases upon which appellant relies do not support a contrary contention.
>
> . . . . . .
>
> "We conclude that since (1) appellant admits that he was offered a sales route, (2) there is substantial evidence that the route offered did afford comparable opportunities as to seniority, status and pay, and (3)

> the Act does not require restoration of the same position, provided a position of like seniority, status and pay is proffered, there was no error in the conclusion of the court that appellant was not entitled to the relief sought, namely, restoration to his 'former employment as route salesman with the same route which he was working immediately prior to his induction'."

In this case appellant, despite its belief that appellee had no rights under the Selective Training and Service Act, considered him to be a good salesman [R. 142, 143, 151-152, 217] and offered him a position which was fully the equivalent of his pre-war "position" in seniority, status and pay. In January, 1946, Mr. Kerr, vice-president of appellant, offered him a position as a full-time employee in charge of the Kansas City territory as then constituted, selling not only appellant's products but also those of its subsidiaries, P. & C. Hand Forged Tool Co. and Peneus Corporation [Stip. Ex. 50, App. A, par. 10], and replacing Mr. Freund who had succeeded to that position upon appellee's entry into the navy, upon the identical terms then applicable to Mr. Freund [R. 122-124, 186-187]. Under those terms, the company would employ two other men to assist him in covering the territory and the commissions of 7½% on all sales in the territory would be divided between appellee and these other salesmen in a mutually agreeable manner, which in Freund's case was 40% to Freund and 30% to each of the others [R. 127-129, 156, 187, 216-217]. It was a condition of the Kansas City offer that appellee would have to give his full time to the company and give up his other lines within a period of approximately thirty days [R. 123, 124, 126].

This requirement was the stumbling block [R. 123] and was the only part of the offer to which appellee made any

objection. He refused the offer because he was unwilling to give up his other lines [R. 123], saying that he would have to have at least a year before he could do so [R. 125] and reiterating in a letter dated February 10, 1946 [Ex. 31; R. 131-132], that he was going to continue with the others "at least until the first of the year."

Likewise in January, 1946, appellant, through Mr. Kerr, offered appellee an alternative position as manager of the Chicago territory selling the products of appellant and its subsidiaries [Stip. Ex. 50, App. A, par. 10], upon the same terms as to commissions as then enjoyed by the company's other salesmen [R. 124]. The Chicago territory was not then as productive as the Kansas City territory, although it was considered to be potentially even better [R. 193], and for this reason appellant offered, in connection with the Chicago territory, to let appellee continue his handling of other lines for the period of one year in order to supplement his earnings [R. 124-125, 186, 192-193]. Appellee also rejected this alternative offer [R. 130-131].

The good faith of appellee in stating that he wanted at least a year in which to give up his other lines is open to some question in view of events subsequent to January, 1946. In March of that year, appellee met Mr. Kerr in Kansas City; the offers were repeated and appellee was still unwilling to give up his other lines [R. 132-133]. Again in December, 1946, when the year originally mentioned by appellee had almost passed, he saw Messrs. Pendleton and Kerr in Atlantic City. They renewed the offer to take him back on a full-time basis in either the Kansas City or the Chicago territory; but again he declined to relinquish his other lines [R. 134-135, 179-180]. The fact that he was then receiving more commissions than he had received from all sources, including appellant, in

1941 and 1942 [Ex. Q] undoubtedly increased his reluctance to give up the others and to work exclusively for appellant.

It is clear that the offer of the Kansas City territory on a full-time basis was fully the equivalent of appellee's pre-war "position" in seniority, status and pay.

As for seniority, if appellee had accepted the offer, he would have displaced Freund [R. 129, 148], who had taken charge of the territory upon appellee's entry into military service, on exactly the same basis as that enjoyed by Freund. Appellee would have regained the exact position which he would have had in 1946 if he had never left in 1942, and thus would have "stepped back on the escalator" at the same relative point where he left it. See: *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284-285.

With respect to pay, appellee cannot complain of the decreased area of the territory or of the reduction in the commission rate to 7½%, which was in effect in 1946 for all salesmen [R. 135-136, 201]. As the Court of Appeals for the Third Circuit so aptly said in *Schreier v. M. H. Fishman Co., Inc.* (3 Cir.), 176 F. 2d 722, at 726:

> "Under the principle of the Fishgold case if the escalator moves down instead of up we think the veteran must accept that detriment precisely as the employer must carry the burden of increased salary if the escalator turns upward."

Nor can appellee complain of the requirement that two other salesmen be employed by the company to assist him in covering the territory and be compensated out of the

commissions earned on sales in the territory, for more adequate coverage could thus be attained and the total territorial commissions correspondingly increased.

The decrease in the area of the territory is rendered completely insignificant by the fact that the total sales in appellee's pre-war territory were only $110,000 in 1941 and $136,000 in 1942, whereas sales in the reduced territory amounted to $404,000 in 1945 and $737,000 in 1946 [Ex. S]. More importantly, the somewhat smaller Kansas City territory accounted for 7.65% of appellant's total commission sales in 1945 and for 7.38% in 1946, whereas the larger territory handled by appellee produced in 1941 only 6.9% and in 1942 only 5.2% of the total [Ex. S].

Even with the lower commission rate, the decreased area and the two assistant salesmen, the position offered appellee as manager of the Kansas City territory afforded an opportunity for earnings greatly in excess of his pre-war earnings derived from appellant, and even in excess of his pre-war earnings from all sources.

During 1946, Mr. Freund, whom appellee would have replaced if he had accepted the offer, received $34,877.21 from appellant Plomb Tool Company (net of amounts paid the other salesmen in the territory) and an additional amount of $4,633.66 from appellant's subsidiary, P & C Hand Forged Tool Co., whose products appellee would likewise have been authorized to sell under the offer [Exs. 48, 49]. This total of $39,510.87 is to be compared with $12,576.20 which was the average annual amount of appellee's earnings from Plomb in 1941 and 1942 and with $22,197.79 which represents his average annual earnings from *all sources* in those years [Ex. Q]. In fact, Freund's earnings from Plomb and its subsidiaries

for the four years 1946 through 1949 averaged $23,566.01 per year [Ex. 48], thus exceeding appellee's average earnings from all sources during 1941 and 1942. In the light of these facts, there can be no question but that the offer of the Kansas City territory was more than equivalent in opportunity for earnings.

Appellee's only reason for refusing the offer was that he would have been required to relinquish his other lines. But that condition in no way destroyed the equivalence of the offer, for the privilege of representing other lines was in essence merely a matter of compensation or pay. That privilege had been extended in the early days of the company by reason of its inability to pay adequately for the full time of its sales representatives [R. 30-31], and the comparative earnings set forth above demonstrate beyond question that the compensation for the position offered appellee was more than adequate to make up for dropping his other lines.

The District Court in its oral opinion concluded that the offer of the Kansas City territory fell short of being an offer of a position of like seniority, status and pay "(1) by reason of the indefiniteness of the commission rate, and (2) by reason of the fact that although one other salesman [Schrenker] who had not entered the service was being permitted to handle other lines in another territory, that privilege which this plaintiff had enjoyed prior to the time he entered the service was to be denied him in the offer made." [R. 221.]

As to the commission rate, the evidence shows without conflict that appellee was told by Mr. Kerr that the commission rate for all salesmen had been reduced to 7½%

[R. 126-127]. The evidence further shows [R. 128-129, 156], and appellee admitted [R. 216-217], that as part of the offer, appellee and Mr. Kerr definitely discussed the percentage of total Kansas City territory commissions which appellee would have been entitled to receive as head of the territory and the smaller percentage which the two assistants would have received had the offer been accepted.

Further, appellee's steadfast refusal to accept any position which required that he forego representation of other lines made it unnecessary for appellant to delineate any more specifically the details of its offer [R. 188], for those details were unimportant so long as the major difference between the parties remained. In *Major v. Phillips-Jones Corp.* (S. D. N. Y.), 18 C. C. H. Labor Cases, Par. 65,853, it was held that the defendant had made an offer of a position of like seniority, status and pay and that plaintiff's rejection of such offer barred his rights under the Act even though the defendant in making the offer had never designated the territory in which it would be willing to reinstate the plaintiff. The Court said at page 77,848:

> ". . . The plaintiff refused the aforesaid offer of reemployment and made it clear that he would not accept any territory except the one which he had at the time he entered the service and that he would travel to Chicago or New York only with the understanding that he would receive his old territory immediately. At no time did plaintiff request defen-

dant to inform him the territory it would be willing to grant him, nor did he ever give the defendant an opportunity to so inform him."

Similarly in this case, appellee raised no question concerning the division of commissions between the manager and other salesmen in the territories offered him [R.197].

As already noted, Schrenker had not been required to drop his two other small tool lines by January, 1946, because he had agreed to devote, and was devoting, his own full time efforts to appellant's business, leaving his other lines to his assistants [R. 136, 171], with the result that appellant was obtaining the same benefit from his services as from an employee salesman. This was clearly an arrangement far different from that which appellee contemplated when he refused to relinquish his other lines. Further, Mr. Schrenker had been advised that he would have to change over at the end of the year [R. 136, 140].

We submit that appellant did offer appellee "a position of like seniority, status and pay" equivalent to that left by him, and that the District Court's conclusion to the contrary [Concl. III, R. 18] is erroneous as a matter of law. Appellee's unequivocal rejection of this offer because it required full time employment, constituted a waiver of any rights to reinstatement or damages otherwise conferred on him by the Act. In short, he refused to become an employee and insisted upon renewal of his status as an independent contractor, a matter beyond the scope of the Selective Service Act.

E. Assuming, Without Conceding, That Appellee Is Entitled to Any Relief, the Relief Awarded Appellee Is Excessive as Matter of Law on Five Counts.

If any relief was justified (which we deny on the grounds already stated), it was erroneous to order appellee reinstated for one year after judgment and to award him damages in the amount of $79,475.05, together with interest at 7% from January 1, 1947, an aggregate sum of $102,185.25.

1. By Reason of His Delay in Filing Suit, Appellee Is Not Entitled to Recover Any Damages for Loss of Earnings for Any Period Prior to the Commencement of This Action on September 22, 1949.

The District Court awarded damages for loss of earnings for the calendar year 1946 [Find. XV, R. 15-16] plus 7% interest from January 1, 1947 [Concl. V, R. 18], on the theory that appellee was entitled to reinstatement for one year after his application in January, 1946 [R. 221-222]. In view of the fact that this suit was not filed until September 22, 1949, this award is contrary to the established rule, consistently adhered to by the courts, that a delay of only a few months in filing suit precludes the award of damages for any period prior to the commencement of the action,—and this although the veteran has not been guilty of such laches as will bar his entire rights under the Act (see Point B, *supra*). In fact, no case has been found in which any court has awarded damages for a period prior to the commencement of an action where the delay extended over a period even approaching the three years and seven months involved in this case.

In *Kay v. General Cable Corporation,* 59 Fed. Supp. 358, affirmed on rehearing 63 Fed. Supp. 791, the court held that a veteran's delay of six months in instituting suit precluded the award of any damages for the period prior to the filing of the action, saying (59 Fed. Supp. at 360):

> ". . . The Act contemplates that such action shall be taken immediately upon an employer's refusal to restore and specifically instructs that 'The court shall order a speedy hearing in any such case and shall advance it on the calendar.' It follows that if proceedings are not instituted in the District Court until some six months following the veteran's discharge from service and the employer's refusal to restore him to his former position, notwithstanding that negotiations between the employer and the veteran have been held in the interim, it would be beyond the scope of the Act to compel the employer to compensate for such extended period."

On rehearing the court said further regarding negotiations (63 Fed. Supp. at 794):

> "Where the refusal by the employer is final, the Act does not contemplate that a veteran shall conduct fruitless, long continued efforts at reinstatement and on a failure thereof, compel such employer to compensate him for this extended period of negotiation, in addition to such reasonable time as may be allowed for appropriate consultation."

Appellee's fruitless and spasmodic negotiations with appellant fall directly within the meaning of the above quotation from the *Kay* case and therefore cannot excuse his delay. Further, it will be recalled that appellee waited more than ten months after the last of appellant's frequently reiterated refusals to reinstate, in November 1948, before commencing this action.

Further illustrative of the rule are *Dacey v. Bethlehem Steel Co.* (D. Mass.), 66 Fed. Supp. 161, involving a delay of nine and one-half months; *Azzerone v. W. B. Coon Co.* (W. D. N. Y.), 73 Fed. Supp. 869, involving a delay of eight months; *Polansky v. Elastic Stop Nut Corp.,* 78 Fed. Supp. 74, where the delay was thirteen months; *Anglin v. Chesapeake & Ohio Railway Co.* (S. D. W. Va.), 77 Fed. Supp. 359, involving eighteen months' delay; and *Patrick v. Norfolk & Western Ry. Co.* (S. D. W. Va.), 18 C. C. H. Labor Cases, Par. 65,723, where a delay of twenty-three months was held not only to preclude recovery of damages for the period prior to filing suit, but also to bar the entire action on the ground of laches.

The award of damages for the interim period between the employer's refusal to reinstate and the commencement of an action is barred by the veteran's delay in filing suit even though the delay is occasioned by his seeking the assistance of the appropriate authorities such as the United States attorney and the veteran's agencies. *Thompson v. Chesapeake & O. Ry. Co.* (S. D. W. Va.), 76 Fed. Supp. 304; *Noble v. International Nickel Co., Inc.* (S. D. W. Va.), 77 Fed. Supp. 352, 354-5.

As already noted, appellant was in no way responsible for the three years and seven months of delay in this case, and certainly not for the ten months of delay after negotiations broke down. As in the cases cited above, it would be unfair to uphold an award of damages for any period prior to the filing of the action on September 22, 1949, for otherwise, the veteran is permitted to wait through the year in which he claims the right to reemployment in order to see how his earnings from other sources compare with those of the position he claims and then, if the balance becomes

favorable, to collect from the employer. (The injustice to the appellant in this case is aggravated by the District Court's failure to allow an offset for appellee's other earnings, to be discussed below under Point E, 5.)

2. The Selective Training and Service Act Guarantees a Veteran Only One Year's Reemployment and Appellee Is Not Entitled to Damages Measured by His Loss of Earnings During the Entire Calendar Year 1946 in Addition to Reinstatement for the Period of One Year Sometime Subsequent to the Beginning of the Year 1951.

The Selective Training and Service Act guarantees a veteran reemployment for one year by prohibiting discharge of a reinstated veteran without cause during that period. The judgment of the District Court gave damages for loss of earnings for the entire year 1946 and also ordered appellee reinstated for one year after judgment [R. 20-21], thus giving appellee the benefit of two years of reemployment. The damage award gave him the benefit of the earnings from the "position" he claimed, *i. e.,* his exact pre-war territory at his pre-war commission rates, with the continued right to handle other lines and without offset for earnings derived therefrom. The order for reinstatement, however, provides that appellee shall be reinstated in the Kansas City territory as it presently exists, at present compensation rates, and as a full-time employee. In essence, the judgment orders appellee reinstated in the very position which appellant offered, and which appellee rejected when he originally sought reinstatement in 1946 (thus recognizing, in effect, the equivalence of the offer held not to be equivalent).

Could there be a more onerous judgment than one which allows a litigant to accept five years later the benefits of a

proposition which he rejected, merely because history has demonstrated that his original rejection was not well conceived, and at the same time awards damages in the amount of $102,185.25 on the theory that his rejection was justified? We think not!

The award of damages for the year 1946 is not only inconsistent with the authorities cited above which limit damages to the period following commencement of the action, but also is in error in awarding damages for a period so chronologically separated from the time of reinstatement. Courts have awarded damages in addition to reinstatement for the period of one year on the theory that such damages are incidental. If damages in an amount of $102,185.25 could ever be termed incidental, they quickly lose such character when thus separated from the time of reinstatement.

3. Damages Measured by Loss of Earnings for 1946 Should Have Been Computed on the Basis of the Commission Rate of 7½% Actually in Effect for All Appellant's Sales Representatives During That Year.

The District Court awarded damages for loss of earnings in 1946 on the basis of appellee's pre-war commission rates of 12½% and 8%, an average rate of 12.11% [Find. XV, R. 15-16], despite the fact that appellant in 1944 uniformly reduced the commission rate to 7½% for all sales representatives [R. 201]. This reduction was made for well-considered business purposes and, as events subsequently proved, resulted in an increase in total commissions to the salesmen by virtue of the increase in sales volume.

In these circumstances, awarding appellee damages based upon a 12.11% commission rate resulted in preserving for the veteran a super-seniority which is not within the scope of the Act.

In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, the United States Supreme Court said at page 284:

> ". . . He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job . . ."

And further at pages 285-6:

> ". . . But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

As previously quoted from *Schreier v. M. H. Fishman Co., Inc.* (3rd Cir.), 176 F. 2d 722, at 726, *supra:*

> "Under the principle of the Fishgold case if the escalator moves down instead of up we think the veteran must accept that detriment precisely as the employer must carry the burden of increased salary if the escalator turns upward."

In other words, it is the intent of the Act to prevent discrimination by preserving to the veteran a status comparable to that which he held at the time he entered the service in relation to the other employees. It is not the intent of the Act to grant a "super-seniority." Where the commission rates have been uniformly reduced for all sales representatives, an award of damages at a higher commission rate results in granting the prohibited super-seniority and discriminates against non-veterans.

4. Loss of Earnings Should Have Been Computed on the Basis of the Kansas City Territory as It Existed in 1946.

As in the case of the commission rate, the award of damages for loss of earnings in 1946 was based upon sales in the Kansas City territory as it then existed, as well as in the State of Minnesota and the four South Dakota counties which were included in that territory when appellee had it in 1942, but which had subsequently been eliminated from it. This portion whittled off from appellee's pre-war territory, prior to his request for reinstatement, had accounted for only a small amount of appellee's sales [R. 147]. And, as already pointed out, the smaller Kansas City territory in 1946 produced far greater sales volume and, more importantly, accounted for a greater percentage of the company's total commission sales, than did the somewhat larger territory handled by appellee in 1942.

The authorities cited in the next preceding section of this brief with reference to the reduced commission rate are equally applicable here. To have awarded appellee damages based on sales in the Kansas City territory, as geographically constituted in 1946, would not have discriminated against him. On the contrary, it would have given him commissions on a higher percentage of the

company's total sales than he had theretofore enjoyed. That higher percentage was the result of a more concentrated sales effort on the part of the company and the men who covered the territory during appellee's absence, and would have more than compensated him for the loss of Minnesota and the four South Dakota counties. The damage award as computed by the District Court gave appellee the benefit of both, and in fact rewarded him with the same "super-seniority" that was not intended by the Act. In line with the principle that the veteran is entitled to "step back on the escalator" whether it has travelled up or down, the damages should have been computed on the basis of the area of the territory as it had been changed in the normal course of business during his absence.

5. Any Damages Awarded Appellee for Loss of Earnings Should Have Been Subject to Offset for Amounts Earned by Appellee in Other Employment During the Same Period.

The veterans' reemployment cases clearly establish the principle that an employer is entitled to an offset, in determining the amount of damages awarded a veteran, for the veteran's earnings from other employment during the same period. *Bentubo v. Boston & Maine R. R.* (1 Cir.), 160 F. 2d 326; *Hayes v. Boston & Maine R. R.*, 66 Fed. Supp. 371, 374, aff'd (1 Cir.) 160 F. 2d 325; *Thompson v. Chesapeake & O. Ry. Co.* (S. D. W. Va.), 76 Fed. Supp. 304, 308, *supra*. These cases are in line with the general principle which requires that damages be mitigated.

But the District Court refused to allow an offset for appellee's other earnings, and in effect gave appellee the benefit of almost the full-time efforts of another man (Freund) for 1946, in addition to the fruits of appellee's

own full-time efforts in selling the five other lines handled by him in 1946.

The District Court's damage computation [Find. XV, R. 15-16] takes into account the total gross sales of Plomb tools in the Kansas City territory, as constituted in 1946, and the total gross sales in Minnesota and four South Dakota counties which were included in the pre-war Kansas City territory. Such sales were the sales achieved by five full-time employee salesmen; three (including Freund) in the post-war Kansas City territory, and two in Minnesota and South Dakota, who sold only the products of appellant and its subsidiaries. The computation gives appellee credit for commissions on these total sales at his pre-war average rate of 12.11%, and then deducts the amounts actually paid as commissions, at the 1946 rate of 7½%, to the four men other than Freund (whom appellee was held entitled to replace). In effect the District Court held (and said in its oral opinion [R. 222]) that appellee would have been able to earn (at 12.11%) all the commissions from appellant that Freund did (at 7½%) as a result of substantially his full time efforts, in addition to what appellee actually earned during 1946 by the handling of five other lines. That Freund spent substantially his full time on sales of Plomb products is demonstrated by the fact that his compensation from the sale of Plomb tools in 1946 was more than 88% of the total compensation he received that year from the sale of products of appellant and its subsidiaries [Ex. 48].

Appellee presumably spent his full time in earning the $24,141.56 which was paid to him in 1946 in the form of commissions by the five firms then represented by him [Ex. Q]. This is shown by the fact that his 1946 earn-

ings from those five firms were larger than his earnings in either 1941 or 1942 from those firms and from appellant [Ex. Q]. Obviously appellee, by devoting to the sale of the other lines in 1946 the additional time and effort which he had formerly spent in the sale of appellant's products, was able to increase his gross sales of the other lines to about 260% of their 1942 volume.

While there is a suggestion in appellee's testimony that he could have sold the appellant's tool line along with his other five lines by utilizing time that was available in any event [R. 218], the accuracy of such an assertion is belied not only by common sense and logic, but also by the increase mentioned above in the sales of appellee's other lines after he had ceased to represent Plomb. It simply doesn't make sense that a salesman with five lines of products can take on a separate and substantially unrelated tool line, continue to sell the same volume of the other five lines, and in addition sell the same volume of the tool line as another man had been able to sell spending approximately his full time on that line. A salesman cannot call upon a customer and discuss six or more lines of products as effectively as a single tool line. As previously pointed out, Mr. Kerr and Mr. Pendleton testified that customers resisted sales by manufacturer's representatives with numerous lines of products and preferred a full-time employee salesman representing one line. And Mr. Kerr, who has had long experience in the tool business and who is now serving as vice-president of one of appellant's competitors [R. 118], testified that his experience showed

that it is *not* just as easy for a man handling several automotive parts lines to sell a tool line in conjunction therewith, and that such a combination does not work out satisfactorily. A tool line, being more detailed and having many items, requires more merchandising activity on the part of a salesman in talking to the prospective customer, checking stock, etc., and does not work out efficiently in conjunction with other automotive lines [R. 144-145].

Since Mr. Freund derived 88% of his income in 1946 from the sale of Plomb products and presumably spent at least that proportion of his time on such sales, it would be only just and reasonable to permit an offset for 88% of appellee's earnings from other sources in 1946, for he would have had to spend approximately that portion of his time on Plomb sales in order to achieve the results obtained by Freund. The same principle should be applied to the period after the filing of the action on September 22, 1949 (which we contend is the only period for which damages could properly have been allowed, if any at all were justified), during which approximately 95% of Freund's earnings were derived from Plomb sales, as distinguished from those of its subsidiaries [Ex. 48], and in connection with which there should be an offset for 95% of appellee's earnings from other sources during the same period.

The District Court's denial of any offset gave appellee the benefit of practically the full-time efforts of Freund while permitting him to keep as well the fruits of his own full-time efforts.

Conclusion.

For the reasons set forth above, appellant respectfully submits that the judgment of the District Court should be reversed and the cause remanded with instructions that judgment be entered in favor of appellant.

Respectfully submitted,

O'Melveny & Myers,
Sidney H. Wall,
Clyde E. Tritt,
Attorneys for Appellant.

APPENDIX A.

[Title of District Court and Cause.]

Pre-Trial Stipulation.
(Plaintiff's Exhibit 50.)

STIPULATION OF FACTS.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel of record, that the following facts are true and may be taken by the Court as true for the purposes of this action, subject, however, to such objections, reservations or limitations as are hereinafter specified by the respective parties hereto in Section III of this Pre-Trial Stipulation, and subject further to the right of either party hereto to introduce at the trial of this action other evidence not inconsistent with the facts herein stipulated:

1. In this action plaintiff claims that defendant wrongfully failed to reemploy him after his discharge from the armed forces of the United States, in asserted violation of his rights under the Selective Service Act of 1940 (50 U. S. C. App. Sec. 308) and the Service Extension Act of 1941 (50 U. S. C. App. Sec. 357). He seeks, (a) an order that he be reinstated in the employ of the defendant and, (b) a judgment for damages in the amount of $200,000.

2. Defendant is a corporation duly organized and existing under the laws of the State of California and defendant maintains a place of business at 2209 Santa Fe Avenue, City of Los Angeles, State of California. Defendant is engaged in the business of manufacturing and selling hand tools and related items.

3. In November 1942, and for approximately nine years prior thereto, plaintiff was authorized as a manufacturer's representative to sell merchandise of defendant on a commission basis in the following territory: the states of Kansas, Iowa, Minnesota and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the following counties in the State of South Dakota: Brown, Beadle, Sanborn and Bonhemme; and the City of Rock Island, Illinois.

4. In November 1942 plaintiff terminated his said relationship with defendant in order to perform military training and service in the armed forces of the United States, and plaintiff thereupon entered upon active naval service in the naval forces of the United States and served continuously thereafter in such naval service on active duty until November 15, 1945, at which time plaintiff was relieved from such training and service and was ordered released from active duty.

5. Immediately prior to plaintiff's entry upon active naval service as aforesaid, plaintiff was engaged in the sale of defendant's products on a commission basis as stated in paragraph 3 above under and pursuant to a certain agreement in writing between plaintiff and defendant executed by plaintiff on January 18, 1941, as amended by a supplemental territorial agreement dated February 1, 1941, and executed by plaintiff on March 19, 1941, by an extension agreement dated December 8, 1941, and executed by plaintiff on December 16, 1941, and by supplemental agreements dated respectively April 22, 1942, and September 23, 1942.

6. During the entire period from January 1, 1941, to November 1942 covered by the aforesaid written agreement, as amended and extended:

(a) Defendant did not furnish plaintiff with an office and did not pay or reimburse plaintiff for any office expenses.

(b) Plaintiff as a manufacturer's representative represented other manufacturers in addition to defendant and was authorized to and did sell on a commission basis the products and merchandise of other manufacturers in addition to those of defendant. During the period from January 1, 1941, to November 1942, plaintiff so represented the following other manufacturers:

Wohlert Corporation, Lansing, Michigan;

Powell Muffler Company, Utica, New York;

Eis Automotive Corp., Middletown, Connecticut;

Pep Manufacturing Co., New York, New York;

National Motor Bearings, Oakland, California; and

Precision Parts Manufacturing Co., Chicago, Illinois.

(c) During said period from January 1, 1941, to November 1942, plaintiff received $26,072.16 from defendant as compensation for his sales of defendant's products, and during the same period plaintiff received from other manufacturers $20,244.49 as compensation for the sale of the products and merchandise of such other manufacturers.

(d) With the exceptions noted below, plaintiff paid his own expenses in connection with his activities as such manufacturer's representative in selling defendant's products and those of other manufacturers represented by him, and in connection therewith plaintiff hired and paid with his own funds one assistant who was chosen by plaintiff and who acted pursuant to plaintiff's directions. Defendant, in January 1941, paid plaintiff $30 in partial reimbursement of his expenses in attending an Automotive Service

Industry Convention. Defendant made available to plaintiff a display truck owned by defendant, and in December 1941, defendant paid plaintiff $200 for repairs and tires for said truck.

(e) In the conduct of his business as such manufacturer's representative, plaintiff chose his own customers to whom he sold or attempted to sell products of defendant and determined his own itineraries in calling upon customers and prospective customers. Plaintiff was requested by defendant to make reports to defendant concerning such itineraries and calls, but plaintiff did not follow any regular reporting plan as requested. Defendant from time to time furnished to plaintiff names of prospective customers in plaintiff's territory from whom defendant received inquiries, and plaintiff reported to defendant regarding the same.

(f) Defendant made no deductions from commissions paid or payable to plaintiff by it for or on account of Social Security taxes, old age benefits or unemployment insurance.

(g) Plaintiff made no investment in a stock of defendant's merchandise. In addition to its stock in Los Angeles, defendant maintained and paid the storage charges on a stock of merchandise in Kansas City from which customers in plaintiff's territory were supplied insofar as possible.

(h) Defendant had the final authority on extension of credit to customers, and in specific instances from time to time defendant requested plaintiff to report to it upon his activities in collecting past due accounts.

7. On November 15, 1945, plaintiff was placed on inactive duty by the United States Navy with a certificate of

satisfactory service, and his terminal leave expired December 29, 1945.

8. During the month of January 1946 and within ninety days after plaintiff was released from training and service in the naval forces of the United States, plaintiff made application to defendant for renewal of his prewar status as a manufacturer's representative selling defendant's products as hereinabove described in Paragraphs 3 and 5 hereof, but upon such application defendant refused to renew plaintiff's said prewar status.

9. In January 1946 when plaintiff requested renewal of his prewar status with defendant, defendant had revised the geographical limits of its sales territories, and the State of Minnesota and all counties in the State of South Dakota had been eliminated from the territory in which plaintiff formerly had been authorized to sell defendant's products. At that time, the sales of defendant's products in such reduced territory were being handled by two full-time salesmen employed by defendant, which salesmen handled the sale of no products other than those of the defendant and its subsidiary corporations, P & C Hand Forged Tool Co. and Penens Corporation. Defendant had theretofore determined that the employment of full-time salesmen in said territory as aforesaid was necessary by reason of the increase in the volume of defendant's business and in the number of its customers.

10. In January 1946 when plaintiff applied for renewal of his prewar status, defendant offered plaintiff a position as an employee of defendant, selling exclusively the products of the defendant and its subsidiary corporations, P & C Hand Forged Tool Co. and Penens Corporation, either

(a) in the territory in which plaintiff had been previously authorized to sell defendant's products on a commission basis, as such territory had been revised as aforesaid, or (b) in the "Chicago territory" which then consisted of the State of Illinois and portions of the States of Indiana, Michigan and Wisconsin. Plaintiff had, prior to his military service, handled and sold products of said subsidiary corporations only in cases where such subsidiaries had made tools for defendant on special orders, and only as a manufacturer's representative for defendant. Plaintiff was informed that if he accepted either of the foregoing proposals it would be necessary for plaintiff to work for defendant exclusively as set forth above and to cease to represent other manufacturers as he had done prior to the war.

11. During the month of January 1946, plaintiff advised defendant that he was unwilling to sever his connections with other manufacturers and was therefore unwilling to accept either of the positions offered him by defendant.

12. Thereafter and during the month of March 1946 plaintiff took up with the Selective Service System the matter of his claim for reinstatement with defendant.

13. Plaintiff was informed that the Office of the Director of Selective Service for the State of California had conferred and corresponded with defendant during or about the months of August, September and October 1946 regarding plaintiff's claim for reinstatement, and that the defendant refused to renew plaintiff's prewar status.

14. The United States Attorney in Chicago, Illinois did not file suit against defendant on behalf of plaintiff to enforce plaintiff's claim for reinstatement, and turned the file concerning such claim over to plaintiff in February 1948.

15. During or about February 1948 plaintiff consulted the law firm of Arvey, Hodes and Mantynband of One La Salle Street, Chicago, Illinois, regarding the plaintiff's claim for reinstatement.

16. On or about November 4, 1948, the law firm of O'Melveny & Myers of 433 South Spring Street, Los Angeles, California, as attorneys for defendant, in a letter sent to said firm of Arvey, Hodes and Mantynband, rejected, on behalf of defendant, plaintiff's said claim for reinstatement, and the contents of such letter were made known to the plaintiff on or before December 1, 1948.

17. An action was filed by plaintiff against defendant in the United States District Court for the Northern District of Illinois on or about July 22, 1949, to enforce plaintiff's asserted right to reinstatement, which action was dismissed without prejudice on or about September 20, 1949, for want of jurisdiction over defendant in the Northern District of Illinois.

18. The geographical limits of the territory in which plaintiff formerly had been authorized to sell defendant's products have been further revised from time to time since January 1946 and such territory now comprises the States of Kansas and Missouri, that portion of Nebraska east of the extension of the Colorado eastern border, certain

counties in Illinois, and all of Iowa except certain counties therein. Each of the areas eliminated from time to time from said territory has been made a part of another of defendant's sales territories.

19. At the present time three salesmen employed by defendant are handling the sale of defendant's products in the territory referred to in the preceding paragraph. At all times since January 1946 the sales of defendant's products in plaintiff's former territory have been handled by at least two salesmen employed by defendant, and during one period since that date four salesmen were employed by defendant to handle such sales in said territory; and at all such times such salesmen have handled the sale of no products other than those of defendant and its said subsidiary corporations.

20. During the period from January 1946 to September 22, 1949, the date of the commencement of this action, defendant has paid large and substantial sums of money to salesmen employees as compensation for selling defendant's products in the territory in which plaintiff was formerly authorized to sell such products.

21. During the period from the date of plaintiff's release from the naval forces of the United States in December of 1945 to January 23, 1950, plaintiff rendered services to the following firms or corporations in the sale of their products, during the respective periods specified below and received from said respective firms or corporations as compensation for personal services the respective amounts set forth below:

Names and Addresses	Date of Employment	Gross Receipts
Wohlert Corporation Lansing, Michigan	Jan. 1, 1946, to date	$51,040.67
Eis Automotive Corp. Middletown, Conn.	Jan. 1, 1946, to date	20,606.55
Powell Muffler Company Utica, New York	Jan. 1, 1946, to date	5,090.29
Precision Universal Joint Co., Chicago, Illinois	Jan. 1, 1946, to Nov. 1947	1,334.00
Pep Manufacturing Co., New York, New York	Jan. 1, 1946, to Feb. 1949	1,836.71
Warehousing Service Co., Chicago, Illinois	Jan. 1, 1947, to March, 1949	1,925.24
Hygrade Products Co., New York, New York	March 1947, to January 1948	1,054.36
U. S. Axle Company Pottstown, Pa.	Jan. 1946, to date	2,305.59
Buell Mfg. Company Chicago, Illinois	April 1948, to date	4,597.65
Bingham Herbrand Corp., Fremont, Ohio	March 1949, to date	1,757.99
	Total Gross Receipts	$91,549.05
Less Commissions to other salesmen		7,787.60
	Receipts	$83,761.45

The phrase "to date" in the foregoing tabulation refers to the date of January 23, 1950.

APPENDIX B.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS.
(Plaintiff's Exhibit 51.)

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel of record, that the evidence in the above-entitled cause shall be deemed to have been opened by the Court upon motion of the plaintiff; that the plaintiff shall be deemed to have offered evidence of the facts hereinafter set forth; that the defendant shall be deemed to have objected to the introduction of such offered evidence on the ground that the same was irrelevant and immaterial; that such objection shall be deemed to have been overruled by the Court; and that competent evidence of the following facts shall be deemed to have been received by the Court as a part of the record in the above-entitled cause:

1. The gross sales made by the defendant during the year 1946 to customers located in the State of Minnesota and in the Counties of Brown, Beadle, Sanborn and Bonhemme in the State of South Dakota (being the portion of plaintiff's territory as constituted in 1942 which was not included within defendant's Kansas City Territory as constituted in 1946) amounted to $208,000.

2. During the year 1946 defendant employed two full-time salesmen for the purpose of selling its products and merchandise in Minnesota and the aforesaid counties of South Dakota, and during 1946 defendant paid to said

salesmen compensation equal to 7½% of the gross sales mentioned above, which compensation amounted to $15,-600.

3. The so-called "buy-outs," with respect to which plaintiff was entitled to receive only an 8% commission under his contract with defendant in effect at the time of his entry into military service [Exhibits 15, 16 and 19] constituted 8.53% of defendant's gross sales in 1946 both in defendant's Kansas City Territory as then constituted and in Minnesota and the South Dakota counties referred to above.

It Is Further Stipulated that this supplemental stipulation of facts may be filed and received in evidence in the above-entitled cause; provided, however, that nothing herein contained shall be construed as a waiver by defendant of its objection to the admissibility in evidence of the foregoing facts as noted above.

Dated: January 22, 1951.

APPENDIX C.

(Exhibit 15.)

CONTRACT.

I, LIONEL H. SANGER, of 1729 McGee Street, Kansas City, Missouri, do hereby make application to The Plomb Tool Company, of Los Angeles, California, hereinafter called the "Company," for the franchise or right to sell merchandise of the Company for the period from January 1, 1941 to December 31, 1941, inclusive, according to the following conditions and provisions:

1. The merchandise to be sold hereunder will be that supplied by the Company and included in the regular general catalog of the Company and such other merchandise as may hereafter be mutually agreed upon.

2. I shall offer the said merchandise for sale only to those Automotive Jobbers, Industrial Jobbers, Wholesale and Retail Hardware Jobbers, Plumbing and Air Conditioning Jobbers, whose credit standing the Company shall have first approved.

3. The territory in which I shall operate will be the following and no other: The States of Iowa, Kansas and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the State of Minnesota; the following Counties in the State of South Dakota: Brown, Beadle, Sanborn and Bonhemme, and Rock Island, Illinois.

4. I further undertake to use all reasonable effort which may assist the Company in collecting accounts arising out of my sales hereunder; and I further agree to use all reasonable diligence in maintaining display boards and other property of the Company placed in my possession or under my care with my permission, and to account to the Company for said property upon its demand therefor.

5. I hereby declare that I believe that close cooperation between the Company and myself will operate to the advantage of both parties in developing business hereunder through which both parties will profit directly. I therefore further declare that I shall conduct my operations hereunder so as to maintain and increase the good will and reputation of the Company both inside and outside the territory within which I operate; and I further declare that I shall give earnest and cooperative consideration to such information and suggestions concerning desirable results to be obtained as the Company may from time to time transmit to me; and I further declare that I shall not, during the existence of this contract, become concerned in any way with the sale of other products, without first consulting with and obtaining written permission from the Company.

6. By its acceptance of this application the Company agrees:

(a) To use all reasonable efforts to collect accounts receivable arising out of my sales under this agreement.

(b) To furnish for my assistance all sales promotion and advertising material it furnishes to other contractors similar to myself, of kind and quantity appropriate to the status of my operations hereunder.

(c) To pay to me by the 25th of each month the following commissions, based on all moneys arising out of sales to customers in my charge and collected and received by the Company during the preceding month: On sales of current standard stock Plomb tools at current catalog prices and discounts (subject to exceptions here following) a commission equal to twelve and one-half per cent (12½%);

on adjustable wrenches and pliers, ten per cent (10%); on so-called "Buy-Outs," five per cent (5%). On sales of the above described tools at less than the said prices, and on sales of any Company product other than those covered hereunder, and on sales in said territory to other than the classes of purchasers herein described to be my customers, the Company may base an allowance of commissions to me, if in its discretion the same are warranted, according to the conditions and circumstances of each such sale. The Company agrees to make no sales of specified merchandise, to specified purchasers, in the specified territory, as per paragraphs 1, 2, and 3 hereof, without crediting to me the foregoing commissions.

7. It is understood by and between both parties hereto that this application and agreement expresses the entire contract between the parties hereto and that nothing shall be considered a part hereof unless agreed to by both parties in writing.

8. This agreement may be cancelled by either party hereto upon thirty (30) days' notice in writing mailed to the other party at his/its last known address. After the termination of this contract I shall not use to the advantage of myself or any other person, firm or corporation any confidential information gained from the files or business of the Company.

9. No waiver by either party hereto of any provision hereof shall amount to a waiver of such provision in the future.

10. Performance of either party hereto shall be excused when occasioned by act of God; but I agree that if I shall

suffer any disability which may reasonably be assumed to prevent my performance as contemplated under this contract, the Company shall have the right to suspend this contract forthwith, and to take such measures as the Company may consider necessary to protect its interests in the territory herein described.

11. Nothing herein contained shall be construed to create any relationship of employer and employee between the Company and me or to vest in me any power or authority to engage employees of any kind on behalf of the Company or to obligate the Company in any manner, or to vest in the Company any right or power to control the means or manner of accomplishing the results herein contemplated. It is distinctly understood that in order to achieve said results I am to select and use my own methods and means, including the personnel of my assistants and employees, if any, to operate hereunder at my own risk and expense, and to hold the Company free and harmless from any and all liability resulting from my operations hereunder; provided, however, that said work shall be done in such manner as will be consistent with the achievement of the result contracted for, at the time or times herein specified.

Signed this 18th day of January, 1941.

LIONEL H. SANGER.

Accepted:

THE PLOMB TOOL COMPANY,

By D. STEVENS.

APPENDIX D.

(Exhibit 15.)

SUPPLEMENTAL TERRITORIAL AGREEMENT.

As of February 1, 1941, the paragraph listed below will supersede paragraph "C" in the attached sales agreement.

c. To pay to me by the 25th of each month the following commissions, based on all moneys arising out of sales to customers in my charge and collected and received by the Company during the preceding month: On sales of current standard stock Plomb tools at current catalog prices and discounts (subject to exceptions here following) a commission equal to twelve and one-half per cent (12½%); on adjustable wrenches and pliers and on so-called "buy-outs," eight per cent (8%). On sales of the above described tools at less than the said prices, and on sales of any Company product other than those covered hereunder, and on sales in said territory to other than the classes of purchasers herein described to by my customers, the Company may base an allowance of commissions to me, if in its discretion the same are warranted, according to the conditions and circumstances of each such sale. The Company agrees to make no sales of specified merchandise, to specified purchasers, in the specified territory, as per paragraphs 1, 2 and 3 hereof, without crediting to me the foregoing commissions.

Signed this 19th day of March, 1941.

LIONEL H. SANGER.

Accepted:

THE PLOMB TOOL COMPANY,
By D. STEVENS.

APPENDIX E.

(Exhibit 16.)

December 8, 1941

Mr. Lionel H. Sanger
1817 McGee Street
Kansas City Missouri

Dear Lionel:

The contract which exists between us and under which you sell our tools as an independent contractor will expire at the end of this year. It is our wish to continue this contract.

We therefore propose that the said contract be continued in full force and effect for a further period of one year, to expire December 31, 1942, upon the same terms and conditions with the exception that Paragraph 6 (c) be amended to read as follows:

6. (c) To pay to me by the 25th of each month the following commissions, based on all moneys arising out of sales to customers in my charge and collected and received by the Company during the preceding month: On sales of current standard stock Plomb tools at current catalog prices and discounts (subject to exceptions here following) a commission equal to twelve and one-half per cent (12½%); on adjustable wrenches and pliers and on so-called "buy-outs," eight per cent (8%). On sales of the above described tools at less than stated prices, or on sales of any company products other than those covered herein, or on sales in said territory to other than the classes of purchasers herein described to be my customers, or on any sales made under contract, or supply bids to the United

States Government or any of its departments, or on sales to manufacturers or for the purpose of servicing their products, the Company may base an allowance of commissions to me, if in its discretion the same are warranted, according to the conditions and circumstances of each such sale. The Company agrees to make no sales of specified merchandise, to specified purchasers, in the specified territory as per paragraphs 1, 2 and 3 hereof, without crediting to me the foregoing commissions.

If the foregoing is satisfactory to you, will you please so indicate by signing both copies of this letter agreement in the space provided below, attach one copy to your copy of the contract above-mentioned and return one copy to us for the same purpose.

The Plomb Tool Company,
By D. Stevens.

Accepted and agreed to this 16th day
of December, 1941.
Lionel H. Sanger.